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ABSTRACT

Intended for use in school law courses of a primarily informative nature with some attention given to attitudinal concerns, this book was designed for teachers and educational administrators. The contents are divided into 13 units that contain information regarding education and the American legal system, certification and employment, religion and the schools, First Amendment rights of teachers, First Amendment rights of students, search and seizure, legal issues related to supervision of pupil conduct, tort liability, racial segregation, equal opportunity under the law, the law relating to instruction, the law relating to attendance, and the law relating to education of children with handicaps. The appendices detail selected provisions of the United States Constitution and provide a glossary of terms. (KM)

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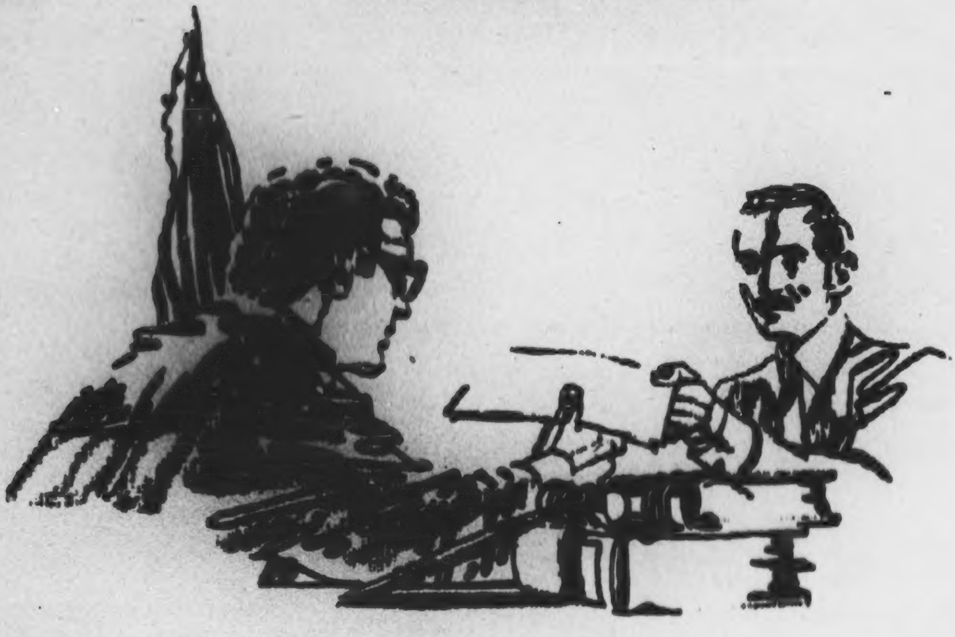

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SCHOOL LAW

FOR

KENTUCKY TEACHERS AND ADMINISTRATORS

Third Edition

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Preface

This book is intended primarily for use in courses in school law for teachers or educational administrators. Such a course is mainly informative in nature, with some attention given to attitudinal concerns. Administrators should master the content of the entire book. Teachers could omit the last sections of Units Two, Eight, and Ten and perhaps all of Unit Nine.

Informational content is of three kinds. First, there is an attempt to inform the students as to what "law" is, where it comes from, how and why it is interpreted, the roles of different bodies in the creation and interpretation of law, and the concepts and principles that provide the framework within which the courts view cases. Second, there is an attempt to inform students of the approximate present status of the law related to public schools and the prospective obsolescence of the "facts" they have just learned. Fortunately, legal principles are somewhat more enduring than are the specifics of the law. Third, some information is provided on how and when to use legal sources.

In the attitudinal realm the most important concern is couched in negative terms; that is, that the students do not develop the attitude that they are qualified to serve as their own school attorneys. A more subtle concern is that students develop a distinction between what is legally permissible (or mandatory), what is morally desirable, and what is politically feasible. If an educator must choose between obeying the law, his conscience, or the powers-that-be he should be aware that he is making a choice and that there are alternatives. Finally, there is a concern that too frequently educators have an orientation toward control and compliance that leads them to equate law with order. This is countered by showing that the law is also concerned with justice and with protecting the rights of individuals.

A major problem for many public school personnel is their lack of understanding of their legal rights and responsibilities and of the whole legal structure within which they operate. Legal problems with students, parents, and community organizations are increasing in number and complexity. A wrong step can land the educator in court with the accompanying expense, notoriety and embarrassment. Litigation cannot be avoided entirely, but by knowing the law, anticipating problems, and taking precautionary steps, school people can minimize it and increase their chances of success in any suits that may be filed. Avoiding needless litigation is a legitimate reason for studying school law.

Because of the nature of our democratic society school personnel should become informed about the law. Democracy is based upon law and order and the respect for the rights of all citizens. One purpose of education is to prepare an educated citizenry for life in a democratic society. To do this effectively school people must know and follow legal and constitutional principles. They must demonstrate by their practice that they hold values which honor these principles.

Understanding constitutional requirements and legal principles helps administrators advise the board on adopting proper policies and helps teachers advise the administration on developing appropriate rules and regulations. Professional practice is improved when all practitioners and controlling boards are aware of their obligations. Common understandings increase efficiency and improve the image of the profession. Educators must understand the individual rights of pupils and of school employees, the academic freedom of teachers, and their obligations to parents. Professional practice and status are enhanced by avoiding litigation, being consistent in actions, and advising peers, pupils, and patrons correctly on school policy.

In this book the authors have followed standard English practice in using the masculine form of the pronouns (he, him, his) to refer to persons of either gender. Please be assured that the authors are well aware that many of our best teachers and administrators are females. We intend no disrespect by following standard English usage. Charles Faber, Lois Barnes, and Don Martin share responsibility for Units One through Eight as well as Units Eleven and Twelve. Mike Norman and Charles Faber prepared Unit Thirteen. The senior author accepts responsibility for Units Nine and Ten as well as overall accountability for the book.

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UNIT ONE

EDUCATION AND THE AMERICAN LEGAL SYSTEM

Background of School Law

Kentucky like other states received its authority and responsibility for supporting public education through the enactment of the 10th amendment to the U. S. Constitution. Public education in the US is a power reserved to the states, and the maintenance of a system of public schools becomes a plenary responsibility of the state. The power to maintain a system of public schools is an attribute of government comparable to the power to tax, to maintain a system of courts, to keep a military establishment, or to exercise police power. The state finds its power to tax to maintain a system of public schools in its obligation to nurture an intelligent citizenry and to promote the peace of society. This concept of the supremacy of the state, with respect to all educational matters, is a concept which guides our courts in resolving the practical issues involved in the maintenance and administration of our public schools.

A state generally expresses its educational policy through its constitution and through acts of its legislature. A state legislature has full power with respect to educational policy except where restricted by either the state or federal constitutions. It may determine the types of schools to be established, their means of support, their curriculums and the qualifications of their teachers. It may be all of these things with or without the consent of the localities, because in education the state is the unit, and there are no local rights except those safeguarded by the constitution or delegated by the state.

Section 183 of the Constitution of the Commonwealth of Kentucky requires that "The General Assembly shall, by appropriate legislation, provide for an efficient system of common schools throughout the state." The constitution provides further (Sec. 59) that the General Assembly shall not pass local or special laws for the control of the common schools, and the General Assembly has provided that the system of common schools in Kentucky must be uniform. (KRS 158.010).

Complying with these provisions, the General Assembly has divided the state into local school districts and distributed the responsibilities for the common schools between local and state school officials with the entire system of public education in Kentucky being under general control of the State Board of Education.

Law comes from all three branches of government - legislative, executive, and judicial - and from all three levels of government - national, state and local.

1. The kind of law created by the legislative branch is known as statutory law. When a bill passes both houses of Congress and is enacted into law (with or without the signature of the President) it becomes a Public Law (P.L.) and is assigned a number. Thus, the Education for All Handicapped Children Act of 1975 became P.L. 94-142 - the 142nd act passed by the 94th Congress. The law may be found in the publication Statutes at Large, where laws are arranged chronologically. It is also published in the United States Code (USC), where laws are codified by topic. The statute referred to above is codified as 20 U.S.C. Section 1401. This means it may be found in Volume 20 of the United States Code.

   At the state level bills enacted by the General Assembly are published in Kentucky Revised Statutes (KRS) and codified by topic. Statutes related to school employees, for example, are found in Chapter 161 and assigned a number such as KRS 161.720 or KRS 161.790.

   At the local level, municipalities can pass ordinances. School boards, as quasi-municipalities, have limited powers and cannot enact legislation for the general governance of the populace. Most local school boards have School Board Policy Manuals, which contain policies guiding the operations of the board, its employees, and the students. The board does not have an actual legislative function (KRS 156.160).

2. The kind of law promulgated by the executive branch is usually called administrative law. At the national level, the president may issue executive orders, and the cabinet-level departments and other administrative agencies may issue rules and regulations. When Congress enacts a statute affecting education, the Department of Education or some other administrative agency will develop a set of rules and regulations to direct implementation of the statute. These rules and regulations become administrative law. They are published chronologically in the Federal Register and codified in the Code of Federal Regulations.

At the state level administrative agencies develop administrative regulations to implement legislative enactments. For example, the General Assembly passed a statute KRS 156.160 requiring the State Board of Education to adopt rules and regulations relating to minimum courses of study for the different grades and kinds of common schools. In response the State Board developed a required program of studies, published in the Kentucky Administrative Regulations and identified as 704 KAR 3:304.

Local school board policies were mentioned in the section on statutory law above. In addition, local boards and school administrators develop rules and regulations. Some school districts publish administrative regulations along with the school board policies. Other districts do not have all of their policies and regulations compiled in a readily accessible form. Many of the regulations most directly affecting teachers can be found in the Teacher's Handbook which most schools provide for each teacher.

3. The courts have the duty of interpreting law. Interpretation involves clarifying the law, saying what it applies to, what it requires or prohibits, etc. Court decisions are binding on legislative and executive branches and must be followed by inferior courts. Therefore, court decisions are an important source of law. Despite claims of some present day reactionaries that the Supreme Court should only interpret law and not make law, this has long been a function of the judicial branch in English speaking countries.

Both the English common law, inherited by the United States, and United States constitutional law are examples of judge-made, or case law.

Hierarchy of School Law

Because there are different types of law, emanating from various sources, the effective operation of our legal system depends upon the existence of a clear-cut hierarchy of law. If two laws are in conflict, it is essential to know which law prevails.

As the Constitution of the United States is the basic framework upon which the structure of government is constructed, it is the supreme law of the land. It is superior to the constitutional provisions of each of the states, superior to Congressional and state legislative enactments, and superior to all kinds of administrative law. In order to be valid, all other law must be in accord with the Constitution.

At the national level the Constitution is supreme, then, followed in hierarchical order by statutory law, and finally by administrative law. Case law is interpretative law and its place in the hierarchy depends on the kind of law being interpreted. The rank order is always: first, constitutional; second, statutory; third, administrative.

Law can be changed only by competent authority; that is, by the agency that made the law or by a higher authority. The Constitution as ratified by the several states can be changed only by following the amendment process specified in the document itself. Of course, interpretation of the Constitution, that is, deciding what it means in a particular case, may be changed by the appropriate competent authority - the courts. The Supreme Court is the highest court and all other courts are bound by its decisions. Through the doctrine of stare decisis, "to stand by decided cases," and the rule of precedent, once a point of law has been determined by the courts, it is fixed law and can be changed only by competent authority. Although the Supreme Court almost always follows precedent, it can overrule a previous decision. It seldom does this, but when it does so it does it explicitly and with a careful statement of reasons for overruling the previous decision or for declaring why the precedent does not apply to the case under consideration. Thus, case law can and does change.

All statutes enacted by the United States Congress must be in accord with the Constitution, and are subject to review by the Supreme Court to see that they meet that criterion (if challenged by someone who claims to be damaged by a particular statute) and are also subject to interpretation by the Courts.

Except for certain presidential powers assigned by the Constitution, all administrative law promulgated by the executive branch must not only be in accord with the Constitution but also must have statutory authorization. In other words, rules and regulations issued by the Department of Education can be valid only if they are conceived in order to implement some program authorized by Congress. In regard to such rules and regulations the function of the courts is three-fold - to see that they do not violate the Constitution, to see that they do not exceed Congressional authorization or subvert Congressional intent, and to interpret the meaning of the rules in specific questions. All of these duties arise only when brought to the Court in a justiciable controversy by an appropriate party.

At the state level a somewhat similar hierarchy prevails. The State Constitution, provided it does not conflict with the Constitution of the United States, is supreme. Statutes enacted by the state legislature need to be in accord with both constitutions. Rules and regulations of state administrative agencies must be constitutional and in line with statutory requirements. State courts are bound to recognize the supremacy of the Constitution of the United States and (in the absence of conflicts) of the state constitution and to recognize the authority of statutory law enacted by the state legislature over administrative law. State courts must recognize the supremacy of federal courts in dealing with federal questions. There is a hierarchy of courts within each state to handle state cases.

At the local level the situation is quite different. Local school districts are not recognized by the U. S. Constitution and are recognized to a very limited degree, if at all, by state constitutions. There is no equivalent of a constitution at the local level. There is even no real local equivalent of a legislative body. The local school board is a quasi-legislative, quasi-administrative agency. Its policies are law, only in a very limited sense. A school board cannot enact criminal law, and its civil law authority is very rigidly restricted by the state legislature. The division of responsibility between a school board and its administrative staff is nowhere near as clearcut as that between Congress and the President, for example. Unless this division is specified by state statutes, it is likely to be very fuzzy indeed. Furthermore, there is nothing remotely approaching a court to make case law at the local school district level. The board of education itself is the hearing agency in teacher dismissal and student expulsion cases, for example. Thus the board serves not only in a quasi-legislative and quasi-administrative, but in a quasi-judicial capacity as well.

This hierarchy of school law is depicted on the accompanying chart.

HIERARCHY AND SOURCE OF SCHOOL LAW

LEVEL	CONSTITUTIONAL	STATUTORY	ADMINISTRATIVE	CASE
National	1A Source: Constitution of the United States Priority: Top Subject to interpretation by 1D	1B Source: U.S. Congress Priority: Second only to 1A Subject to interpretation by 1D	1C Source: Executive Branch and Administrative Agencies of United States Priority: Third, behind 1A and 1B Subject to interpretation by 1D	1D Source: Supreme Court of the United States and other federal courts
State	2A Source: State constitution Priority: As state law, top (but cannot conflict with 1A) Subject to interpretation by 2D and (if a federal question is involved) by 1D	2B Source: State legislature Priority: As state law, second to 2A Subject to interpretation by 2D and (if a federal question is involved) by 1D	2C Source: Executive Branch and administrative agencies of the state Priority: As state law, third to 2A and 2B. If legitimate federal interest intervenes it is also behind 1B and 1C Subject to interpretation by 2D and (if a federal question is involved) by 1D	2D Source: State Supreme Court and other state courts (if a federal question is involved must not conflict with 1D)
Local	3A None	3B Quasi-statutory only Source: School board Priority: Behind all applicable laws at levels 1 and 2 Subject to interpretation by 2D and (if a federal question is involved) by 1D	3C Source: School board, superintendent, and other administrators Priority: Lowest Subject to interpretation by 3B, 2C, and 2D and (if a federal question is involved) by 1D	3D No true judicial power at local school district level.

The double lines indicate the separation of powers between the legislative, executive, and judicial branches and also the division of powers between the national and state levels. The single lines represent the lack of separation of power at the local level and the lack of division of power between the state and local level.

The Constitution provides for the division of powers between the national and state governments and at the national level for the separation of powers among the legislative, executive, and judicial branches of government.

As far as the division of powers between national and state governments is concerned, the pertinent part of the Constitution for educators is the Tenth Amendment: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." Education is nowhere mentioned in the Constitution; the word "schools" does not appear in the Constitution; obviously, control of education and of the schools is not delegated to the national government nor prohibited to the states. Therefore, control of education is assigned by the Constitution to the states. Education is a responsibility of the states, and control of the educational system within each state is a function of state government. This is firmly established by tradition and legal precedent and is beyond question. The national government has no Constitutional authority to control education or the schools, as such. The national government does have certain powers, however, which can be reasonably implied from the powers which are specifically granted. Among the implied powers are some which get the government involved in educational activities of many kinds.

Because of this constitutional arrangement, there is no single federal agency devoted to educational policy-making. In the United States there are thousands of local boards of education, dozens of state boards of education dealing with the public schools, but no national board of education. With no group charged specifically with formulation of national educational policy, it is no wonder that there is no consistent, coordinated policy at the national level. Such policy as does exist emanates from many different sources and is incomplete, inconsistent, and fragmented. The chief source of such policy is the Congress. The Congress, consisting of the House of Representatives and the Senate, is charged with the legislative function. The executive branch, comprised of the president's office, the cabinet departments, and the administrative agencies, is charged with the administrative (policy-implementing) function. The Department of Education is charged with implementing educational policies, but many other executive departments administer programs affecting education. The judicial branch, consisting of the Supreme Court and other federal courts, is charged with the judgment of legal disputes, which implies interpretation of the law, and thus interpretation of the Constitution itself. Thus, the Constitution provides for a separation of the powers and even gives a written description for each of the three branches, but the line between policy-making and administration is blurred and indistinct, and is violated at the national level even as it is at the state and local levels.

What does the Constitution say about the authority of Congress to make educational policy? Article I, section 8, is concerned with the powers of Congress and starts by saying "The Congress shall have power to lay and collect taxes...and provide for the common defense and general welfare of the United States." This section starts with the so-called general welfare clause and ends with the implied powers or elastic clause: "...To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or office thereof." Congress thus has the power to pass legislation affecting education, providing the laws are passed under the guise of providing for the common defense or promoting the general welfare of the country. From the very beginnings of this nation the Congress has exercised this prerogative to support the common schools, the land-grant colleges, vocational education, and other contributors to the general welfare. In 1958 Congress passed the National Defense Education Act promoting those aspects of education it deemed essential to the national defense. Congressional concern for promoting the general welfare through educational legislation peaked in the 1960's but continues to this day.

The Constitution guarantees certain rights to citizens and other persons living in the United States. These include such fundamental rights as freedom of speech, press, religion, and assembly; the right to petition for redress of grievances; the right to be secure from unreasonable search and seizure; the right to a fair trial; protection against self-incrimination, double jeopardy, and cruel and unusual punishment; equal protection of the laws; and the right not to be deprived of life, liberty, or property without due process of law. These rights are derived from the Bill of Rights and the 14th Amendment and have been extended to public school teachers and pupils by court interpretation.

If a teacher or pupil feels his constitutional rights have been violated, he has access to the courts to seek a remedy.

The Constitution is written in very general terms. Otherwise, the basic document developed for the governance of 3,000,000 people living along the Eastern seaboard in a pre-industrial society could not have survived nearly two hundred years with only 26 amendments to govern a world power of 200,000,000 people in a post-industrial society. But the very generality which led to the Constitution's longevity has caused the need for interpretation. If two reasonable people can read the same words and not find them precisely identical in meaning, who is to say which interpretation is right? In the western world, such determination has long been the province of the courts.

Judicial Review

Judicial review is the process whereby a court determines the constitutionality of actions taken by the legislative and executive branches, both at the national and state levels. The classic statement of judicial review in the United States was made by Chief Justice John Marshall in the famous case Marbury v. Madison (1803), in which a section of a law passed by Congress was declared unconstitutional. Marshall said:

(1) The constitution is a higher law, superior to ordinary law, such as statutes;

(2) In a conflict between the constitution and ordinary law, the constitution must prevail;

(3) If in litigation properly before a court of law the court finds a conflict between the ordinary law and the constitution, the court must refuse to enforce the ordinary law.

Section 25 of the Judiciary Act of 1789 authorized the Supreme Court to pass upon the validity of state legislation and to review decisions of state tribunals wherein constitutional questions had been answered in favor of the state, or adverse to national power. Fletcher v. Peck in 1810 was the first case in which the Supreme Court declared a state act violative of the provisions of the federal Constitution.

In two early cases the Supreme Court reversed judgments of the Court of Appeals of Virginia. Virginia claimed that the power of the federal courts did not include the review of state court decisions. In Martin v. Hunter's Lessee (1816) and Cohen v Virginia (1821) the Supreme Court held that the federal judicial power extends to every case arising under the Constitution. Thus, it does have the power to overrule state court decisions.

Judicial Restraint

If the Constitution of the United States is what the Supreme Court says it is, then the Court must be exceedingly careful not to substitute its judgment of what ought to be for the actual intent of the document. A question with which the Court must consistently wrestle is: "Is the meaning of the Constitution to be found in the intentions of the men who wrote it, or is it a living, growing thing to be interpreted in the light of changing circumstances?" If the Court is concerned with intent, does this mean the Court should try to determine what Madison or another Founding Father intended at the time he wrote the words or should it try to ascertain what he would intend them to mean if he wrote them today? These questions have not been answered with enough consistency that we can say a legal principle has been established.

Certain other principles are clear, however. Foremost among these is the doctrine of judicial restraint. Under this doctrine the Court has developed a number of restrictions upon its own actions. The Court will not decide a question unless it is presented in the form of a case or controversy that judicial power is capable of acting on to protect or enforce rights or to prevent or redress wrongs. The Court will not render an advisory opinion. It will not exercise functions that are legislative or administrative in character. It will not deal with the wisdom of actions, only with their legality. The Court will not pass on political questions. It will not anticipate a question of constitutional law in advance of the necessity of deciding it. It will rule on constitutionality only if absolutely necessary. If there are any other grounds upon which a case can be disposed of, the Court will not pass on a constitutional question. When it must deal with constitutionality of a statute, it will not formulate a rule of constitutional law broader than is required by the precise facts to which it is applied. When the validity of an Act of Congress is questioned (and even if a serious doubt of constitutionality is raised) it is a cardinal principle that the Court will first ascertain whether a construction of the statute is possible by which the question may be avoided. The purpose of judicial restraint is primarily to retain separation of and balance among the powers. Members of the general public do not recognize how diligently the Court practices the doctrine of judicial restraint, but its record in this regard is very clear to those who have studied it.

The Courts

Judges and Juries

The courts exist to resolve disputes between the government and private citizens or solely between private citizens. In resolving cases the courts must determine two questions: What events occurred giving rise to the dispute (the facts) and what rules of decision apply to the facts (the law). The judge alone determines the law; the sole function of the jury is to determine the facts. In serious criminal cases, the parties have a right to a jury trial as guaranteed by Article III, Section 2 of the U.S. Constitution. Parties may waive their rights to a jury trial. In some civil cases and minor criminal cases, no right of jury trial exists. In such cases the judge determines both the facts and the applicable law.

Jurisdiction

A case is begun in a court with original jurisdiction. This court conducts the trial at which witnesses testify and determines the facts which are at dispute between the parties. The decision of the trail court is not final. The party that loses in trial court may request review of the decision by a court with appellate jurisdiction. An appeals court reviews cases carefully to see if the law was applied correctly. However, it rarely questions the trial court's determination of the facts. It will overturn the lower court's findings of fact when it concludes that no reasonable person could agree with the findings. Juries are not involved in appellate jurisdiction.

The Federal Court System

For most federal cases the court of original jurisdiction is the United States District Court. Each state has one or more such courts. Kentucky is divided into the Eastern District and the Western District. Over 150,000 cases are filed in the United States District Courts each year.

Since 1932 selected District Court cases have been published in the *Federal Supplement* (F. Supp). The citation 72 F. Supp. 142 (E.D. Ky., 1947) refers to a 1947 decision of the United States District Court for Eastern Kentucky, which is published in Volume 72 of the *Federal Supplement*, starting on page 142.

Decisions of a District Court are subject to review by a Court of Appeals. Appeals for the District Courts in Kentucky are taken to the United States Court of Appeals for the Sixth Circuit, which hears cases principally in Cincinnati. The Sixth Circuit also includes Tennessee, Ohio, and Michigan. More than 20,000 appeals are taken to the Courts of Appeals each year. In rare instances an appeal may be taken directly to the Supreme Court, bypassing the Court of Appeals. All decisions of Courts of Appeals since 1879 have been published in the *Federal Reporter* (F. or F. 2d). The citation 489 F. 2d 925 (6th Cir. 1973) refers to a 1973 decision of the Sixth Circuit Court of Appeals, which is reported in Volume 489 of the *Federal Reporter* 2nd Series, starting on page 925.

The Supreme Court of the United States has very limited original jurisdiction. The bulk of its work is of an appellate nature. It reviews cases begun in federal courts and has power to review decisions of state courts when a federal constitution question is involved. The Supreme Court automatically reviews certain cases wherein statutes have been declared unconstitutional by the lower courts. Otherwise, review may be sought by *writ of certiorari*. The court has time to review only a small portion of the cases in which petitions for *certiorari* are filed.

During its 1984-85 term the Supreme Court of the United States had a total of 5006 cases on its docket. Only 15 of these were cases of original juristiction. All nine justices supposedly read each of the 4991 requests for review. The Court spent many days discussing these appeals, deciding which to hear. By tradition if four judges want to hear a case, they schedule full oral arguments. During the 1984-85 session 175 cases were argued before the Supreme Court. Over 4000 appeals were denied, dismissed or withdrawn. The remaining cases were summarily decided (without briefs, oral arguments, or formal opinion) or not acted upon (carried over to the 1985-86 docket).

Most of the cases on the Supreme Court's docket deal with matters other than education. However, the number of education cases decided by the Supreme Court has increased sharply. In view of this increased activity some observers are beginning to ask: "Are the courts becoming too involved in school affairs?"

All Supreme Court decisions are published in several places. The official publication is United States Reports (U.S.) The citation 449 U.S. 39 (1980) refers to a 1980 decision of the Supreme Court published in Volume 449 of the United States Reports, beginning on page 39.

The State Court System

The Kentucky state court system consists of four levels.

The district court is the lowest court, having limited jurisdiction over felony preliminary hearings, misdemeanors and other minor offenses, and civil cases where the amount is less than $2500.

The circuit court is the original trial court for felonies, contested probate, domestic relations, and civil cases involving monetary values of more than $2500. It also has appellate jurisdiction over cases appealed from the district courts and administrative agencies.

A new intermediate appellate court - the Court of Appeals - has existed in Kentucky since 1975. The Court of Appeals normally hears only cases from the circuit courts.

At the highest level is the Supreme Court, which has appellate jurisdiction. It automatically reviews all circuit court decisions imposing the death penalty or more than 20 years in prison. On other matters it has discretionary review from the Court of Appeals. The Kentucky Supreme Court has existed since 1975. Prior to that the Court of Appeals was the highest ranking court in the state. Selected opinions of the Court of Appeals and Supreme Court of Kentucky are published in the Southwestern Reporter. The citation 415 S.W. 2d 607 (Ky., 1967) refers to a 1967 decision of the Kentucky Court of Appeals, published in Volume 415 of the Southwestern Reporter, Second Series, starting on page 607. Decisions of lower state courts are not usually published. The Kentucky Supreme Court also has limited original jurisdiction.

Most of the court cases involving tort liability of Kentucky teachers, teacher contracts, and other matters related to teachers in their official capacity originate in the state circuit courts. Matters of constitutional rights of teachers might be more appropriately raised in the United States District Court.

Legal Research Procedures

Secondary sources, such as legal encyclopedias, textbooks, and periodical articles, are logical starting points in conducting legal research. The second step is to examine the primary sources. This is followed by a study of the annotations and interpretations. The final step is to bring the research up to date by using *Shepard's Citations*.

Secondary Sources

There are two general legal encyclopedias - *Corpus Juris Secundum* (C.J.S.) and *American Jurisprudence 2d* (*Am. Jur. 2d*), either of which may provide a general discussion on the topic. More detailed studies can be found by consulting journal articles listed in the *Index to Legal Periodicals*. Chapters in school law textbooks, NOLPE monographs, or NOLPE Case Citations may also be consulted.

Text and Interpretations

For the text and interpretation of the federal constitution or statutes, see *The United States Code Annotated*. Kentucky constitutional provisions and statutes, with interpretations by the courts and the Attorney General, may be found in *Kentucky School Laws Annotated*. This source is restricted to school laws. For other statutes, see *Kentucky Revised Statutes* (KAR). Statutes from other states are arranged alphabetically in ranges 117-126 of the University of Kentucky Law Library.

The text of federal administrative regulations is contained in the *Code of Federal Regulations* (CFR) and the *Federal Register*. Interpretation may be found in the *Federal Digest*. For state administrative regulations, see *Kentucky Administrative Regulations* (KAR).

In addition to the United States Reports, Supreme Court decisions are reported in other places. Supreme Court Reports (Lawyer's Edition), which is cited as L. Ed, contains not only the text of the decision but also summarized briefs of counsel. The Supreme Court Reporter (S. Ct.) is a part of the National Reporter System and uses the West Publishing Company key-numbered sections of headnotes. Typically, a case is cited by all three of these sources, e.g., Grayned v. City of Rockford, 408 U.S. 104, 92 S.Ct. 2294, 33 L. Ed. 2d 222 (1972). This 1972 case may be found in any one of the three sources - Volume 408 of United States Reports, Volume 92 of the Supreme Court Reporter, or Volume 33 of the Supreme Court Reports, (Lawyer's Edition), second series. It is important not to ignore the "2d" which sometimes appears in citations. This signifies that after numbering volumes to a certain point, the publishers started renumbering a second series. A common mistake is searching in S.W. when one should be looking at S.W. 2d or vice versa.

The National Reporter System, published by the West Publishing Company, reports the opinions of federal courts and of the highest ranking appellate courts in each state. The state reporting units consist of seven regional reporters. Two states - California and New York - are reported separately as well as being included in regional reports.

The entire system, with its coverage of courts of interest to students of school law, is outlined below.

	Began in	Coverage
Atlantic Reporter	1885	Conn., Dela., Maine, Maryland, N.H., N.J., Penna., R.I., Vermont, and District of Columbia
North Eastern Reporter	1885	Ill., Ind., Mass., N.Y., and Ohio
North Western Reporter	1879	Ia., Mich., Minn., Nebr., N.D., S.D., and Wisc.
Pacific Reporter	1883	Alaska, Ariz., Calif., Colo., Hawaii, Idaho, Kan., Mont., Nev., N.M., Okla., Ore., Utah, Wash., and Wyo.

South Eastern Reporter	1887	Ga., N.C., S.C., Va., and W. Va.
South Western Reporter	1886	Ark., Ky., Indian Territory, Mo., Tenn., and Tex.
Southern Reporter	1887	Ala., Fla., La., and Miss.

Supreme Court Reporter	1882	U. S. Supreme Court.
Federal Reporter	1880	From 1880 to 1932: Circuit Courts of Appeals and District Courts of the U.S. From 1932 to date: U.S. Courts of Appeals
Federal Supplement	1932	U. S. District Courts.

New York Supplement	1888	N. Y. (all state courts).
California Reporter	Dec. 1959	Calif. S.Ct., District Courts of Appeal and Appellate Dept. Superior Court.

Keeping Current

The U.S. Code Congressional and Administrative News is issued biweekly or monthly. It gives the full text of current federal public laws. The Federal Register is published daily and gives not only all new administrative regulations but also notices of proposed rule making. Slip opinions and advance sheets contain court decisions published soon after they are rendered. The best source for Supreme Court decisions is the United States Law Week, Supreme Court Section. It not only gives the full text of decisions within a week of their announcement but also provides a calendar of the cases on the court docket.

In order to be certain that a statute has not been amended or repealed or that a court decision has not been overruled or otherwise modified, it is essential to use Shepard's Citations. The Shepard editions cover federal courts, statutes, and administrative regulations as well as state citations. Be sure to use the proper reports series. (Your instructor or an experienced legal researcher should give you a guided tour through the various Shepard volumes.) Detailed illustrations of actual usage are fully set out in the preface pages of each Shepard edition, but it is crucial to find the appropriate edition for the information you are seeking. The process of "Shepardizing" is confusing at first but with practice soon becomes easy. (The publisher says so!)

The University of Kentucky Law Library is tied in with two national computer searches - Lexis and Westlaw. After a student has familiarized himself with the various sources in the law library, he may wish to use the computer to help find sources related to his research topic. The computer is no substitute for first hand knowledge of research procedures.

UNIT TWO

CERTIFICATION AND EMPLOYMENT

1. CERTIFICATION

A. Requirement (KRS 161.020)

1. No person shall be eligible to hold the position of teacher or receive salary for services rendered unless he holds a certificate for such position.

2. No teacher shall enter upon the duties of his position until his certificate has been filed with the board of education employing him.

3. The validity and terms for the renewal of any certificate shall be determined by the laws and regulations in force at the time the certificate was issued.

4. Prospective teachers should become familiar with the KENTUCKY PREPARATION AND CERTIFICATION HANDBOOK and the PROGRAM OF STUDIES FOR KENTUCKY SCHOOLS, both of which are published by the Department of Education.

5. It is essential that prospective teachers know the areas of concentration and the teaching majors and minors in which they are certified. High school subjects can legally be taught only by persons with appropriate certification.

6. Upon successful completion of a teacher education program and the National Teachers' Examination, prospective teachers are awarded a letter of eligibility from the Kentucky Department of Education valid for one year.

7. Provisional certificates are initially issued upon successful completion of the internship year for a 4-year period and may be renewed only upon completion of 15 semester hours toward a planned fifth-year program.

8. It is recommended that teachers who obtain a provisional certificate continue their preparations toward the requirements for a standard teaching certificate (and eventually toward Rank I).

B. Status of Student Teachers (KRS 161.042)

1. A student teacher shall have the same legal status and protection as a certified teacher and shall be responsible to the administrative staff of the school district and the supervising teacher to whom he is assigned.

2. A student teacher is liable for his own negligence.

3. A student teacher cannot serve as a substitute teacher or teach in the absence of the regular classroom teacher.

C. Internship (KRS 161.030)

1. All new teachers and out-of-state teachers with less than two years of teaching experience who are seeking initial certification in Kentucky shall serve a one-year internship.

2. The teacher shall be a full-time employee with supervision, assistance, and assessment during the internship.

3. The internship period shall be counted as experience for the purpose of continuing contract status, retirement eligibility and benefits for salary schedule increments.

4. Successful completion of the internship shall be determined by majority vote of the beginning teacher committee, consisting of the school principal where the internship is served, a resource teacher, and a teacher educator.

5. Upon successful completion of the program the one-year initial teaching certificate shall be extended for the remainder of the usual period established for the certificate.

6. If the teacher's first year performance is judged by the committee to be less than satisfactory, the teacher shall be provided with an opportunity to repeat the internship one time if the teacher is employed by a school district.

D. Deletion of certificate (KRS 161.115)

1. The holder of any Kentucky teacher certification may have any certificate, endorsement, or subject authorization deleted from the official certification record, subject to provisions of KRS 161.115.

2. No deletion shall be made of any subject which the teacher has taught an equivalent of one period per day during any one of the last three years.

E. Career ladder (KRS 161.122)

1. A committee has been appointed to study the feasibility of a career ladder in Kentucky and charged with the making of a report in 1988.

2. A career ladder shall not be implemented until approved by the General Assembly.

F. Definition of Teacher (KRS 161.720)

1. The term "teacher" shall mean any person for whom certification is required as a basis of employment in the public schools of the state with the exception of the superintendent.

2. The above definition applies for purposes of KRS 161.720 to 161.810.

II. CONTRACTS

A. Elements of a valid contract

1. Legal capacity--both parties must have the authority to enter into a contract.

    a. A school district can enter into a contract only through the official action of the board of education in a legally held meeting.

    b. The teacher must also have legal capacity; that is, be of legal age, have a certificate, etc.

    c. Among the limitations on the capacity of the board to contract are the following:

        (1) In Kentucky a board can employ teachers only upon recommendation of the superintendent.

        (2) The board may not delegate its power of contract.

2. Mutual assent—a meeting of the minds, a common, shared understanding of all essential elements of the contract.

    a. Ordinarily, where the terms of a contract are discussed, put in writing and read by both parties, their mutual assent will be presumed.

    b. In case of a teacher's contract, mutual assent is almost always presumed.

    c. Therefore, you should never sign a contract if you do not understand it.

3. Adequate and valid consideration—an appropriate return for both parties from the contract.

    a. A valid contract cannot require one party to do all of the giving without getting something in return.

   b. The terms of the consideration should be stated in the contract; e.g., the school board pays the teacher a specified salary and other stated benefits in return for certain services by the teacher. (The salary need not be specified in the contract, provided the school system's salary schedule is incorporated into the contract.) (See sample form 3123.03 in the unit supplement)

4. Definiteness-the expectations of the contract should be stated.

   a. The contract should be as specific as circumstances permit.

   b. The rights and obligations of both parties should be set out with certainty.

   c. The amount and times of payment must be as prescribed by law. (KRS 160.291).

   d. The beginning and ending dates of the employment period should be stated.

   e. An indefinite promise of employment is probably too vague to be valid.

   f. However, not all possible matters need to be covered in order to make a contract valid.

5. Lawful subject matter--the contract must not be in violation of the law nor against public policy.

   a. A contract to pay a teacher less than the state minimum salary is in violation of the law.

   b. A contract stating that a teacher will not marry during the term of the contract is a violation of public policy (and also of Kentucky law).

B. Written contracts required (KRS 161.730)

   1. Each board of education shall enter into written contracts, either limited or continuing, for the employment of all teachers.

C. Board's responsibility

   1. A valid contract is a legally binding promise.

2. The board has both a legal and a moral responsibility to honor its part of the bargain—to live up to its promise.

3. The law provides means whereby a contract may be legally terminated.

4. The law provides means whereby the board may be compelled to fulfill its promises or be penalized for failure to do so.

D. Teacher's responsibility

1. A valid contract is a legally binding promise.

2. Teachers have both a legal and a moral responsibility to honor their part of the bargain—to live up to their promises.

3. The law provides means whereby a contract may be legally terminated.

4. The law provides means whereby a teacher may be severely penalized for breaking a contract.

E. Legal methods of breaking a contract

1. Reasons which excuse performance.

    a. When performance is impossible, not merely inconvenient, because of an "Act of God."

    b. When a change in the law renders the contract invalid.

    c. When the specific subject matter required of the contract is destroyed, is unique, and cannot be replaced.

    d. When there has been a mutual mistake of fact.

    e. When there has been a fraudulent misrepresentation of fact, the aggrieved party may be excused.

    f. When one party has agreed to the contract under duress, that party may be relieved of obligation.

2. Defective contracts are of two kinds--voidable and void.

a. Voidable contracts contain all of the essential elements of a contract but embrace some irregularity which permits a party to take action to have it set aside. The irregularity may be correctible; for example, a teacher did not have a certificate at the time the contract was signed but later secured one. The board has the option with correctible irregularities: it may ratify the contracts or void them.

b. Void contracts are those which it is impossible to ratify; for example, the teacher is unable to become certified.

3. Resignation

   a. Under certain conditions a teacher may be released from a contract by resigning.

   b. In order to be valid, a resignation must meet these conditions:

      (1) It must be in writing.

      (2) It must be accepted by the board in an official meeting.

      (3) It must be recorded in the board minutes.

   c. A resignation may be withdrawn any time prior to acceptance.

   d. If the board chooses not to release the teacher, it is not obligated to accept the resignation, except as provided by KRS 161.780.

   e. In Kentucky a teacher is permitted to terminate his contract by giving two weeks written notice to the board any time schools are not in session up to thirty days prior to the beginning of the school term. (KRS 161.780)

4. Retirement

   a. A teacher eligible for retirement under provisions of KRS 161.220 to KRS 171.710 may retire under any option available to him.

   b. The teacher retirement plan is too detailed and complex to be discussed in this course. It might be an appropriate topic for an in-service program.

   c. Kentucky statutes do not mandate a compulsory retirement age.

   d. Teachers no longer lose continuing contract status at age 65.

5. Dismissal for cause

   a. The board of education may terminate for just cause the contract of any teacher, whether on tenure or not.

   b. The letter of the law must be followed to every detail in teacher dismissal cases.

   c. The following are listed in KRS 161.790 as causes for dismissal of teachers on continuing contract:

      (1) Insubordination

      (2) Immoral character or conduct unbecoming a teacher

      (3) Physical or mental disability

      (4) Inefficiency, incompetency or neglect of duty

   d. KRS 161.790 also specifies in detail the procedure to be followed in such cases.

   e. As an alternative to termination of a teacher's contract, the board of education may, by majority vote, impose other sanctions including but not limited to suspension without pay, transfer notwithstanding the provisions of KRS 160.380 and 161.760, public reprimand or private reprimand. The decision to impose sanctions is within the discretion of the board after a hearing on the charges.

   f. KRS 161.800 specifies the procedures by which the board of education may suspend the contracts of teachers when decreased pupil enrollment or other reason requires a reduction in the number of teachers.

6. Illegal Breach of Contract

   a. A teacher who refuses to honor the terms of his contract may be guilty of an illegal breach of contract.

b. Upon complaint by the board of education to the state superintendent of public instruction and after investigation by him, the certificate of a teacher who illegally breaks a contract may be suspended for not more than one year.

c. A board of education which dismisses a teacher for constitutionally protected conduct, (See Unit 3) or for causes other than those authorized by law, or which fails to follow procedural due process in every detail may be guilty of an illegal breach of contract.

d. A board of education guilty of an illegal breach of contract may be required by a court of law to do any or all of the following:

   (1) Reinstate the teacher;

   (2) Reimburse the teacher for any salary lost or additional expenses incurred;

   (3) Pay damages to the teacher if constitutional rights have been violated or the teacher's reputation has been unjustly harmed.

III. THE NON-TENURED TEACHER (KRS 161.750)

A. Extension of limited contract

Any teacher shall be deemed reemployed for the school year at the same salary plus any increment provided by the salary schedule unless the superintendent of schools has recommended that the teacher's contract not be renewed and unless the board of education has voted to approve such recommendation.

B. Nonrenewal of contract

1. If the board of education approves the superintendent's recommendation of nonrenewal, the board must present written notice to the teachers no later than April 30 of the school year during which the contract is in effect.

2. Upon request by a teacher, the board shall provide a written, specific, detailed, and complete statement of grounds upon which the nonrenewal of the contract is based.

3. The teacher is not entitled to a hearing on nonrenewal of a limited contract unless the reason for the nonrenewal questions the teacher's reputation, honor, or integrity. (Bates v. Dause 502 F.2d 865, 1974; Board of Regents v. Roth 408 U.S. 564, 1972.)

4. The written statement of reasons must provide substantive grounds and must not violate the teacher's constitutional rights.

C. Nonaction on renewal

1. If the board does not take action as indicated in section (b-1) above, the teacher shall receive a contract of employment for the next school year.

2. Such teacher shall be presumed to have accepted such employment unless the teacher notifies the board in writing by June 15th.

IV. TEACHER TENURE

A. General Provisions

1. Eligibility for continuing service status; (KRS 161.740).

    a. Teachers eligible for continuing service status in any school district shall be those teachers who meet qualifications listed in this section:

        (1) Hold a standard or college certificate as defined in KRS 161.720.

        (2) When a currently employed teacher is recommended for re-employment after teaching four consecutive years in the same district, or after teaching four years which shall fall within a period not to exceed six years in the same district, the year of present employment included, the superintendent shall recommend said teacher for a continuing contract, and, if the teacher is employed by the board of education, a written continuing contract shall be issued.

(3) When a teacher has attained continuing contract status in one district and becomes employed in another district, said teacher shall retain that status provided, however, that a district may require a one-year probationary period of service in that district before granting that status.

(4) Service credit toward a continuing contract shall begin only when a teacher is properly certified as defined in KRS 161.720(6).

2. Any teacher who is inducted into the armed forces of this country shall at the expiration of such service be re-employed the next school year, provided application is made at least 30 days before the opening of school, unless physically or mentally incapacitated.

3. A teacher who returns to service after a leave of absence is entitled to resume the contract status he held prior to such leave. Remember that the contract is to teach in the school district, not in a particular school, subject, or grade level. (Information about the types of leave available to Kentucky teachers is presented in pages 33-34 below.)

4. Continuance of status in case of annexation or consolidation of schools. (KRS 161.810)

   If a school located in one district is transferred to any other district or if the schools in a district are consolidated into a new district, the teachers in such schools employed on continuing contracts immediately prior to such transfer or consolidation shall, subject to the limitations imposed by KRS 161.800, have continuing service status in the new district or in the district to which the territory is transferred.

B. Termination of Contract by Teacher (KRS 161.780)

1. Notice required

   No teacher shall be permitted to terminate his contract within 30 days prior to the beginning of his school term without the consent of the board; any such teacher shall be permitted to terminate his contract at any other time when schools are not in session by giving two weeks' written notice to the employing board of education.

2. Penalty for violation

   Upon complaint by the employing board to the state superintendent of public instruction and after investigation by him, the certificate of a teacher terminating his contract in any other manner than provided in this section may be suspended for not more than one year.

C. Board's Right to Terminate (KRS 161.790)

A board of education may for good cause terminate the contract of a tenured teacher provided it follows substantive and procedural due process, to the letter of the law.

1. The contract of a tenured teacher shall not be terminated except for any of the following causes:

   a. Insubordination, including but not limited to 1. violations of lawful rules and regulations established by the local board of education for the operation of schools, and 2. refusal to recognize or obey the authority of the superintendent, principal, or any other supervisory personnel of the board in the performance of their duties;

      (1) Teachers are required to obey reasonable rules and regulations of the board of education, whether they were in force at the time of employment or not.

      (2) Reasonableness requires that the teacher be given adequate notice of such rules.

      (3) An isolated case of failure to obey authority would probably not be held sufficient cause for dismissal; insubordination usually involves repeated offenses or persistent refusal to obey. (However, a single insubordinate incident, if sufficiently serious, may warrant dismissal.)

      (4) A teacher cannot be dismissed for insisting on constitutional rights, such as freedom of speech, even under the charge of insubordination.

   b. Immoral character or conduct unbecoming a teacher

      (1) Immoral character is almost impossible to define.

(2) Is it necessary that a teacher be found guilty of an immoral or improper act before he can be dismissed? Can a teacher be dismissed for having a bad reputation? Is conviction of a crime automatic grounds for dismissal? Can a teacher be fired for improper conduct which is unrelated to his teaching? The courts are divided on these questions.

  (a) The exemplar theory holds that a teacher should be a model for his students and therefore may be held to a higher standard of conduct than that required of an ordinary citizen.

  (b) A trend is developing that there must be a nexus (connection) between a teacher's private conduct and his teaching performance in order for dismissal to be based upon improper conduct.

  (c) Some courts refuse to accept an "irrebuttable presumption" that a teacher guilty of a crime or a violation of social mores is necessarily of immoral character. It depends upon the nature of the transgression.

(3) Conduct unbecoming a teacher may refer to a teacher's behavior after school hours or off the school premises; it need not be restricted to his classroom activity so long as it affects his relationship to pupils.

c. Physical or mental disability

(1) Medical testimony will be accepted as evidence of physical or mental disability.

(2) Teachers may be dismissed for refusing to submit to physical or psychiatric examination.

d. Inefficiency, incompetency, or neglect of duty, when a written statement identifying the problems or difficulties has been furnished the teacher or teachers involved.

(1) Since the teacher holds a valid certificate, he is presumed competent. The burden of proof of incompetency is on the board of education.

(2) Examples of inefficient or incompetent teaching behavior which can be remedied are not sufficient cause for dismissal.

(3) A teacher must be given a written notice of specific weaknesses that will cause his dismissal unless the quality of his performance improves.

(4) The notice must be provided in time to allow the teacher a reasonable period to correct the alleged deficiencies.

(5) Neglect of duty may result from outside employment or continued illness.

(6) An unavoidable delay of short duration in reporting for work does not constitute neglect of duty.

(7) Willful absence from duty over an extended period of time is grounds for dismissal.

2. Suspension of contracts on reducing number of teachers (KRS 161.800)

   a. When a board of education decides that it will be necessary to reduce the number of teachers, it shall have full authority to make reasonable reduction. In making such reduction, the board shall proceed to suspend contracts in accordance with the recommendation of the superintendent of schools who shall, within each teaching field affected, give preference to teachers on continuing contracts and to teachers who have greater seniority.

   b. Teachers whose continuing contracts are suspended shall have the right of restoration in continuing service status in the order of seniority of service in the district if teaching positions become vacant for which such teachers are qualified.

D. Procedural Due Process

1. Charges

Charges on the above causes shall be supported by written records of teacher performance by the superintendent, principal, or other supervisory personnel of the board.

2. Recommendation

No contract shall be terminated except upon recommendation of the superintendent.

3. Notice

The teacher must be furnished with a written statement, specifying in detail the charges against said teacher, signed by the chairman and secretary of the board of education and naming a date and place at which the teacher may appear before the board of education and answer said charges.

4. Response by teacher

The teacher shall within 10 days after the receipt of the written statement of such charges, notify the board of education of his intention to appear and answer such charges. (Upon failure of the teacher to give such notice, the board of education may dismiss the teacher by a majority vote and such dismissal shall be final.)

5. Hearing

Said date for the hearing shall not be less than 20 nor more than 30 days after the service of such charges upon the teacher.

a. Upon receipt of the teacher's notice of intention to appear and answer such charges, the board of education shall issue such subpoenas as shall be necessary for the determination of the issues involved.

b. The issue shall be heard at the time and place set and the hearing shall be public or private at the discretion of the teacher.

c. Both parties may be represented by counsel and may require the presence of witnesses upon subpoena. Each witness shall be required to take oath or affirmation before an officer of the board of education.

d. The board of education shall provide for a stenographic report of the proceedings and furnish the teacher with a copy.

e. Upon completion of both sides of the case the board of education may by a majority vote dismiss the teacher or may defer its action for not more than five days.

6. Appeal

The teacher shall have a right to make an appeal both as to law and as to fact to the circuit court.

a. If said appeal is not made within 30 days after dismissal, then the decision of the board of education shall be final.

b. Such appeal shall be an original action in said court and shall be commenced by the filing of a petition against the board of education.

c. The board of education shall transmit to the clerk of the court a transcript of the original notice of charges and a transcript of all evidence adduced at the hearing.

d. The court shall examine the transcript and record of the hearing before the board of education and shall hold such additional hearings as it may deem advisable.

e. Either the teacher or the board of education may appeal from the action of the court to the Court of Appeals.

V. SALARY AND TRANSFER PROVISIONS (KRS 161.760)

A. Salary

1. Each teacher shall be given no later than July 1 the board's best estimate of the salary to be paid the next school year. (Increases in salary but not decreases are permitted after the board's annual notice is given.)

2. A teacher's salary for any year cannot be lower than that paid during the preceding school year unless:

   a. Such reduction is a part of a uniform plan affecting all teachers in the entire district; or

   b. There is a reduction in responsibilities.

3. If a reduction of responsibilities is to be accompanied by a corresponding reduction in pay, the board must inform the teacher with a written statement of the reason by May 15. (KRS 161.760)

B. Assignment

1. Employment of a teacher, under either a limited or continuing contract, is employment in the school district only and not a particular position or school.

2. A teacher may be assigned or reassigned upon recommendation of the superintendent and approval of the board without any restrictions at any time prior to July 15.

3. Transfer after July 15 may be made only for the reasons specified by law.

C. DATES TEACHERS SHOULD REMEMBER

April 30 - Deadline for a board of education to "present written notice...that the contract will not be renewed." KRS 161.750

May 15 - Deadline for notification to a teacher of a reduction of responsibility and corresponding reduction in salary. KRS 161.760

June 15 - Deadline for the teacher to reject employment. After this date the teacher is presumed to have accepted employment and is under contract. KRS 161.750

July 1 - Deadline for a board of education to notify teachers under contract for the succeeding school year of the "best estimate as to the salary to be paid such teacher during the year." KRS 161.760

July 15 - Deadline for reassignment of certified personnel, with a number of exceptions. KRS 161.750

Exceptions:

to fill vacancies created by illness, death, or resignations;

to reduce or increase personnel because of a shift in school population;

to make personnel adjustments after consolidation or merger;

to assign personnel according to their certification when a teacher had been appointed to a position outside his field of certification the previous year.

July 15 - "All teachers who refuse assignment shall notify the superintendent in writing not later than July 15." KRS 161.760*

30 days prior to beginning of school term - Deadline for a teacher to terminate his contract without the consent of the board. KRS 161.780

* This is a notice that the teacher is dissatisfied with his assignment and a request to the superintendent that his situation be reviewed to determine whether reassignment is possible. (OAG 64-576)

VI. LEAVES OF ABSENCE FOR KENTUCKY TEACHERS

A. Long-term leaves (KRS 161.770)

1. Upon written request of a teacher a board of education may grant a leave of absence for a period of not more than two consecutive years for professional or educational purposes.

2. Such leave shall be granted where illness, maternity, adoption of a child, or other disability is the reason for the request.

3. Upon subsequent request, such leave may be renewed by the board.

4. A board of education may pay a sum of money equivalent to all or a part of the teacher's salary to a person who has been granted leave for professional or educational purposes if he agrees in writing to return to employment in the district for no less than two years.

5. A board of education may require a teacher to take a leave because of physical or mental disability, but the teacher shall have the right of hearing and appeal as provided in KRS 161.790.

6. Upon the return to service of a teacher at the end of a leave, he shall resume the contract status which he held prior to such leave.

Note the use of "shall" and "may" in the above statute!

B. Short-term leaves

1. Military service (KRS 61.394, 61.396)

   Teachers who are members of the national guard or armed forces reserve are entitled to ten working days leave with pay each year while in the performance of duty or training in the service of the state or nation.

2. Emergency leave (KRS 161.152)

   Teachers may be allowed up to three days emergency leave for reasons designated by the board of education, without loss of pay and without affecting their sick leave. In addition, school districts may allow teachers to use up to three days sick leave per school year for emergency leave.

3. Leave for jury duty (KRS 161.153)

Any teacher who serves on a jury in any local, state, or federal court shall be granted leave with full compensation, less any pay received for jury service, which leave shall be in addition to all other leave to which he is entitled.

4. Personal leave (KRS 161.154)

Each district board of education may provide up to three personal leave days per year to a teacher, without loss of salary and without affecting any other leave entitlement. No reason or justification for the leave shall be required. (Local boards may limit the number of teachers taking personal leave on any one day.)

5. Sick leave (KRS 161.155)

Each district board of education shall allow each teacher not less than 10 days of sick leave each year, without loss of salary.

Sick leave shall be granted to a teacher if he presents a personal affadavit or a physician's certificate stating that the teacher was ill or was absent for the purpose of attending a member of his immediate family (spouse, children, stepchildren, parents, spouse's parents, grandparents, and spouse's grandparents) who was ill.

The 10 days of sick leave may be taken on any 10 days of the school year and shall be granted in addition to accumulated sick leave days.

Days of sick leave not taken by a teacher during any school year shall accumulate without limitation and be credited to that teacher.

Any board of education may, at its discretion, allow teachers sick leave in excess of that prescribed in KRS 161.155.

All sick leave accumulated since June 30, 1985, may remain to the teacher's credit if he transfers from one school district to another within the state.

At time of retirement a board of education may compensate a teacher for unused sick leave days as authorized by KRS 161.155.

A teacher may use up to 30 days of sick leave following the adoption of a child.

A district may adopt a sick leave bank, as provided in KRS 161.155.

Because some of these statutes allow board discretion, teachers should consult the policies of the board in the district where they are employed.

VII. RESPONSIBILITIES OF TEACHERS

A. Teachers are responsible for fulfilling their contractual job responsibilities as stated in the following Kentucky Revised Statutes:

1. KRS 159.170 - Withdrawals and transfers, teachers to investigate and report.

   Whenever any child of compulsory school age withdraws from school, the teacher of the child shall ascertain the reason. The fact of the withdrawal and the reason for it shall be immediately transmitted by the teacher to the superintendent of schools of the district in which the school is located. If the child has withdrawn because of change of residence, the next residence shall be ascertained and included in the report.

2. KRS 161.170 - Teachers to enforce course of study and use of books - removal for failure.

   Each teacher in the public schools shall enforce the course of study, the use of the legally authorized textbooks, and the rules and regulations prescribed for the schools. If any teacher willfully refuses or neglects to comply with the law or such rules and regulations the board of education, upon recommendation of the superintendent, may remove him at any time. When so removed the teacher shall receive payment only for the time taught.

3. KRS 161.180 - Supervision of Pupils' conduct

   Each teacher in the public schools shall hold pupils to a strict account for their conduct in school, on the way to and from school, on the playgrounds, in the lunchrooms and cafeterias, and during intermission or recess.

4. KRS 161.200 - Records to be kept by teachers

   Each teacher in the public schools shall keep an approved record which shall be left with the superintendent or as he directs at the close of the term. The record shall show the program of recitations, classification, attendance and grading of all pupils who attended school at any time during the school year, and such other facts as are required.

5. KRS 161.210 - Reports to be made by teachers

   a. Each teacher shall make reports and inventories to the district superintendent at the time and in the manner prescribed by the district and state boards of education.

   b. No teacher shall willfully make a false monthly or term report of time taught or other item or shall willfully fail to make a required report.

B. Contractual

1. A collective bargaining agreement, where one exists, is considered a part of the contract.

2. As the contract usually does not list every duty a teacher may be called upon to perform, the courts have adopted the view that teachers also have implied duties derived from their contracts.

3. No court will imply a duty that contradicts the express agreement of the parties or express requirements of the statutes.

4. Otherwise, the only legal guideline is whether the designated work is reasonably related to the teacher's function in a particular school.

5. Most courts hold that any duties, including non-teaching assignments, that are reasonable adjuncts to the normal school activities may be required of teachers, as long as such duties are not demeaning to professional status, unreasonably burdensome, or distributed among teachers in a discriminatory manner.

6. Among extracurricular duties implied by courts are supervision of study halls, cafeterias, school-sponsored events, attendance at open house, and teacher workshops.

C. Innate Responsibilities

1. The very nature of teaching requires that all teachers assume certain professional responsibilities in addition to their statutory and contractual duties.

2. The acquisition and maintenance of technical skills and knowledge is a professional responsibility.

3. In school, teachers must obey and cooperate with lawful authority and avoid disruption of school work.

4. Teachers must deal with students, colleagues, board members, and parents in ways that will be conducive to the efficient and effective functioning of the schools.

5. In private life teachers must maintain a standard of conduct that will not undermine their effectiveness in working with pupils, colleagues, and community members.

6. Teachers have a responsibility to maintain that standard of care for their pupils that a reasonable and prudent person would provide in the same or similar circumstances.

VIII. "FAIR DEMOTION" FOR ADMINISTRATORS (KRS 161.765)

A. General Provisions

1. A local board of education may demote an administrator who has not completed three years of administrative service, by approving the superintendent's recommendation for demotion and by complying with the requirements of KRS 161.760.

2. An administrator who has completed three years of administrative service cannot be demoted unless and until the specified procedures have been complied with.

3. The term "administrator" for the purpose of KRS 161.765 shall mean a certified employee, below the rank of superintendent, who devotes the majority of his employed time to service as a principal, assistant principal, supervisor, coordinator, director, assistant director, administrative assistant, finance officer, pupil personnel worker, guidance counselor, or school business administrator, or who holds a position in which he evaluates or supervises board employees or recommends personnel for employment or discharge. The term "administrator" shall also include assistant, associate or deputy superintendents.

4. The terms "demote" or "demotion" for the purpose of KRS 161.765 shall mean a reduction in rank from one position on the school district salary schedule to a different position on that schedule for which a lower salary is paid. The terms shall not include lateral transfers to positions of similar rank and pay or minor alterations in pay increments required by the salary schedule.

B. Due Process

1. Recommendation

An administrator can be demoted only upon the recommendation of the superintendent.

2. Notice

Within five (5) days of receipt of the recommendation, the board shall give written notice of the recommendation to the administrator.

3. Intent to contest

If the administrator wishes to contest the recommended demotion, he shall, within ten days of receipt of the board's notice, file a written statement of such intent to contest with the superintendent. If the administrator does not make timely filing of his statement of intent to contest, the board may take action on the superintendent's recommendation and such action shall be final.

4. Statement of grounds

Upon receipt of the notice of intent to contest the demotion, a written statement of grounds for demotion, signed by the superintendent and board chairman, shall be served on the administrator. Said statement shall contain:

a. A specific and complete statement of grounds upon which the proposed demotion is based, including, where appropriate, dates, times, names, places and circumstances;

b. The date, time and place for a hearing, said date to be not less than 20 nor more than 30 days from the date of service of the statement of grounds for demotion upon the administrator.

5. Answer

Upon receipt of the statement of grounds for demotion the administrator shall, within 10 days, file a written answer. Failure to file such answer will relieve the board of any further obligation to hold a hearing and it may then act on the superintendent's recommendation for demotion.

6. Hearing

   a. The board shall issue such subpoenas as are requested.

   b. The hearing on the demotion shall be public or private, at the discretion of the administrator and shall be limited to the matters set forth in the written statement of grounds for demotion.

   c. The board shall provide to the administrator, a verbatim transcript of the hearing.

   d. The board of education shall hear the case, with the board chairman presiding. The board, upon hearing the evidence and argument presented, shall retire to private chambers to arrive at a decision. Counsel or representatives for either party in the hearing shall not be consulted by the board unless the corresponding counsel or representatives for the other party are present and unless a verbatim transcript of such consultation is made for the record.

7. Decision

   Within five days from the close of the hearing, the board of education shall advise the parties of its decision and shall take official action in the case.

8. Appeal

   Appeal from final board action may be taken in the same manner and under the same provisions as an appeal from board action under KRS 161.790.

IX. REMOVAL OF SUPERINTENDENT

A. General Provisions

1. The position of superintendent is not covered by either the teacher tenure act or the fair demotion law (KRS 161. 790; 161.765). However, a superintendent may have tenure as a teacher in a district.

2. A board of education may refuse to renew a superintendent's contract, and no charges need to be preferred. (OAG 62-440)

B. Removal by Local Board (KRS 160.350)

1. A superintendent of schools may be removed for cause by a vote of four-fifths (4/5) of the membership of a board of education.

2. Written notice setting out the charges for removal shall be spread on the minutes of the board and given the superintendent fifteen (15) days before action is taken on his removal.

C. Removal or Suspension by State Board (KRS 156.132)

1. The superintendent of public instruction or the state board of education shall recommend, by written charges to the proper school authorities having immediate jurisdiction, the removal of any superintendent of schools, principal, teacher or other public school officer who in his or their opinion is guilty of immorality, misconduct in office, incompetency or willful neglect of duty.

2. The superintendent of public instruction shall recommend by written charges the suspension by the state board of education of any district board member or superintendent of schools who in his opinion is guilty of immorality, misconduct in office, incompetency or willful neglect of duty.

3. The state board of education shall, after a summary hearing as provided by regulations, suspend any district board of education member or superintendent of schools, who in the opinion of the majority of the state board of education is guilty of immorality, misconduct in office, incompetence or willful neglect of duty.

4. Such action by the state board of education may be taken upon a recommendation of the superintendent of public instruction, or such action may be taken by a majority vote of the state board of education without recommendation from the superintendent of public instruction.

5. The state board of education may suspend a district superintendent of schools under subsection (2) of this section only if after thirty (30) days of receipt of the written charges specified in subsection (1) of this section, the district board of education has refused to act, has acted in bad faith arbitrarily or capriciously, or if a recommendation to the district board would have been futile.

6. Any officer suspended by the state board of education under subsection (2) of KRS 156.132 shall be furnished with a written statement, specifying in detail the reasons for suspension and naming a date and place at which the officer may appear before the state board of education to answer the charges.

7. The procedures to be followed in providing due process of law to any officer suspended by the state board of education are specified in detail in KRS 156.134.

SUPPLEMENT TO UNIT TWO

SAMPLE CONTRACTS

Shown below are forms which may be used for teacher's contracts in Kentucky. Short forms are shown for both limited and continuing contracts, followed by longer versions of both kinds of contracts. A key, illustrating the validity of the limited contract (long form), is also included.

1. Short form of limited contract

Form 82.7 Teacher's limited contract.

An agreement entered into between [1]—— of [2]——, [3]—— County, Kentucky, and the Board of Education of [4]—— School District in [5]—— County, Kentucky, witnesseth:

The said [1]—— hereby agrees to teach in the public schools of said district for a period of [6]——, and further agrees to abide by and maintain the rules and regulations adopted by such board for the government of the schools in such district.

In consideration of such services, the said board of education agrees to pay to the said [1]—— the sum of [7]—— dollars, payable as follows: [8]——.

This agreement entered into at [9]——, Kentucky, this [10]—— day of ——, 19—.

—— [*Teacher*]
—— Board of Education
By —— [*Title*]

2. Short form of continuing contract

Form 82.6 Teacher's continuing contract.

This agreement entered into between [1]—— of [2]——, [3]—— County, Kentucky, and the Board of Education of [4]—— School District in [5]—— County, Kentucky, witnesseth:

The said [1]—— agrees to teach in the public schools of such district from the date of this agreement until [1]—— resigns, elects to retire, is retired pursuant to law, or until said agreement is terminated or suspended as provided by law, and further agrees to abide by and maintain the rules and regulations adopted by said board of education for the government of the schools of said district.

In consideration thereof, the said board of education agrees to pay to the said [1]—— the sum of [7]—— dollars, annually, to be paid in the following manner: [8]——.

Executed at [9]——, Kentucky, this [10]—— day of ——, 19—.

—— [*Teacher*]
—— Board of Education
By —— [*Title*]

3. Long form of limited contract

3123.02 Teacher's limited contract of employment

LIMITED CONTRACT OF EMPLOYMENT

Commonwealth of Kentucky
County of ....

This contract made and entered into this the .... day of ...., 19....., by and between the ....[Co. or Ind. Dist.].... Board of Education, of ...., Kentucky, hereinafter called the Board, Party of the First Part, and ....[name of teacher]...., of ....[post office]...., ...[county]...., Kentucky, a teacher holding a ....[kind of certificate].... teacher's certificate issued in accordance with the laws of Kentucky, and now in force, hereinafter called the Teacher, Party of the Second Part.

Witnesseth: that at a lawful meeting of said Board, held at ...., on the .... day of ...., 19....., said Teacher was duly appointed in the public schools of ....[Co. or Ind. Dist.]...., for .... (.....) years. The parties to this contract hereby agree to the following conditions:

(1) The services performed by the Teacher are to commence on the .... day of ...., 19....., and are to be performed in such school, or schools and/or such position and at such place or places as may be designated by the superintendent of the district and approved by the Board.

(2) The length of school term shall be fixed by the Board in accordance with law.

(3) For and in consideration of the service provided for by this contract the Teacher shall be paid a salary in accordance with the salary schedule adopted by the Board and approved by the state board of education for any school year coming within the limits of this contract.

(4) The salary shall be payable monthly. The last month's salary shall not be paid until the Teacher shall have made all reports and performed all duties within the period of the school year, lawfully required of the Teacher.

(5) The services to be performed by the Teacher shall be such as are required by law, by the lawful rules and regulations of the state board of education, and by the lawful rules and regulations of the Board.

(6) The power of the Board to suspend or dismiss the Teacher, as provided in Sections 156.132, 161.170, 161.790 and 161.800, Kentucky Revised Statutes, is in no manner impaired or affected by this contract.

(7) The superintendent of the district, as executive officer of the Board, shall cause to be deducted monthly from the salary of the Teacher the amount due to be paid by the Teacher under the terms of the State Teachers' Retirement System, which sum shall be paid to the secretary of the State Teachers' Retirement System, within fifteen days from the date of the close of the school month.

(8) The Teacher shall furnish the superintendent of the district, at regular periods designated by him, a complete list of the pupils between the ages of six and eighteen and a complete list of the pupils who should attend the school being taught by said Teacher, but who were absent during the designated period.

(9) The Board shall keep the school building in good repair, furnish the necessary fuel, furniture, apparatus, books, blanks, and such other appliances as may be necessary for the systematic and proper conduct of the school.

(10) Should the school in which the Teacher is employed be closed temporarily for necessary repairs or because of destruction of the building in which such school is conducted, school should be suspended accordingly until necessary quarters are provided, but any suspension shall not in any manner affect the term or period of such school and the quarters shall be provided without unnecessary delay, and in time to complete the school term within the school year.

Witness the following signatures as of the day, month and year first above written.

.... Board of Education
Party of the First Part

By ...., Chairman

...., Secretary

...., Teacher
Party of the Second Part

KEY - LIMITED CONTRACT

Assess the validity of the sample limited contract, using the five criteria suggested to you in the unit.

A. Legal capacity - examples of validity:

1st paragraph - "teacher holding a ________________ teacher's certificate"

2nd paragraph - "lawful meeting of said "Board"

B. Mutual assent - examples of validity:

2nd paragraph - "the parties to the contract hereby agree to the following conditions..."

Signatures at bottom indicate mutual assent

C. Adequate and valid consideration - examples:

fifth paragraph - "...Teacher shall be paid a salary..."

sixth paragraph - "...The salary shall be payable monthly"

Teacher's expected services are stated in several places.

D. Definiteness

(1) beginning and end dates

fourth paragraph "length of school term in accordance with law" (As the beginning and ending dates are not specified in this contract, a teacher signing it must follow the school calendar as adopted and amended by the board.)

(2) amounts and times of payment

fourth and fifth paragraphs

(3) as specific as circumstances permit - references to salary, services, etc. "as required by law"

(4) rights and obligations of both parties. Several examples may be identified, including the ninth, tenth, and eleventh paragraphs. "The teacher shall furnish... a complete list...

"the Board shall keep the school building in good repair..."

E. Lawful subject matter

Examples of validity are throughout, many of which have been previously mentioned, such as services to be performed by the teacher.

4. Long form of continuing contract

3123.04 Continuing contract of employment

CONTINUING CONTRACT OF EMPLOYMENT

Commonwealth of Kentucky
County of ....

This contract of continuing employment made and entered into this the .... day of ...., 19......, by and between the ....[Co. or Ind. Dist.].... Board of Education, of ...., Kentucky, hereinafter called the Board, Party of the First Part, and,

...., of ...., ...,
(Name) (Post Office) (County)

..................., holding a .... certificate issued in accordance
(State) (Kind of Certificate)
with the laws of Kentucky, and now in force, hereinafter called Teacher, as defined in KRS 161.720, Party of the Second Part.

Whereas, the said Board of the ....[Co. or Ind. Dist.].... School District, at a lawful meeting did appoint said Teacher for continuing employment at a salary to be determined annually by a salary schedule to be adopted by the Board and approved by the State Board of Education, and

Whereas, Sections 161.720 - 161.810, Kentucky Revised Statutes, provide for continuing contracts with each board of education for teachers who are qualified by the terms of said law; and

Whereas, this contract form has been prepared by the Superintendent of Public Instruction and approved and adopted by the State Board of Education for use as is authorized by Section 156.160, Kentucky Revised Statutes,

Now, therefore, this contract witnesseth:

That pursuant to said appointment and in consideration of the said salary to be paid in the manner and at the times prescribed by law, and of the salary for any and all subsequent school terms to be fixed annually by the Board according to law and to be paid in the manner and at the times prescribed by law, the Teacher agrees to perform in a thorough and professional manner all of the duties of said position and employment under the direction of the superintendent of the district, and further agrees to observe faithfully and enforce the rules and regulations lawfully prescribed by legally constituted school authorities in so far as such rules and regulations may be applicable to the position which such Teacher holds.

The parties hereto mutually agree:

1. The services performed hereunder by the Teacher shall begin on the .... day of ...., 19......, and are to be performed in such school or schools and in such position and at such place or places as may be designated by the Superintendent of the district and approved by the Board.

2. The services to be performed by the Teacher shall be such as are required by law, by the lawful rules and regulations of the State Board of Education, and by the lawful rules and regulations of the Board.

3. The services to be performed under this contract shall begin on the date herein specified and shall be continued from year to year for the respective school terms prescribed from year to year by the Board or any other legally constituted authorities.

4. The length of the school term shall be fixed by the Board in accordance with law.

5. Should the school in which the Teacher is employed be closed temporarily for necessary repairs or because of destruction of the building in which such school is conducted, school should be suspended accordingly until necessary quarters are provided, but any suspension shall not in any manner affect the term or period of such school and the quarters shall be provided without unnecessary delay, and in time to complete the school term within the school year.

6. This continuing contract of employment shall remain in full force and effect, subject to all the provisions herein set forth, except as modified by mutual consent, in writing, of the Board and the Teacher, unless and until terminated with written notice, stating cause or causes, to the Teacher, by a majority of the full membership of the Board before March 31 of the then current year, or by written resignation before that date, and such termination shall take effect at the close of the school year in which this contract is so terminated. The expression "cause or causes" as used in this paragraph shall mean failure on the part of the Teacher to fulfill this contract, or violation on the part of the Teacher of a lawful provision thereof. This contract may be terminated at any time by mutual consent of the Board and the Teacher.

7. The power of the Board to transfer, suspend or dismiss the Teacher as provided in Sections 156.132, 160.380, 161.170 and 161.790, Kentucky Revised Statutes, is in no manner impaired or affected by this contract.

8. This contract shall not operate to prevent the suspension of the services of the Teacher based upon the lack of a need for said services. In case of the suspension of the Teacher on account of the lack of need of the services of the Teacher, it shall be done pursuant to the provisions of law relating to allocation of teachers as provided in Section 161.800, Kentucky Revised Statutes.

9. Failure of the Teacher to fulfill this contract, or carry out any lawful provisions thereof, unless prevented from doing so by personal illness or other just cause, or unless released from the contract by the Board, shall constitute sufficient grounds for the revocation of the certificate of said Teacher.

10. The marriage of the Teacher shall not be considered failure to fulfill this contract, or to be a violation thereof.

11. The salary shall be payable monthly. The last month's salary shall not be paid until the Teacher shall have made all reports and performed all duties, within the period of the school year, lawfully required of the Teacher.

12. This contract shall at all times be subject to any and all laws now existing, or that may hereafter be lawfully enacted, relating to the fixing of salaries of teachers, the increase or decrease of such salaries, and the length of the school term.

13. The Teacher shall receive from year to year the benefit of all provisions of law relating to increase of teacher's salaries in accordance with the lawful salary schedule of the district and amount of experience or by reason of character of preparation for the profession of teachers or by reason of certificate or degree issued or conferred by an approved institution of learning.

14. The superintendent of the district, as executive officer of the Board, shall cause to be deducted monthly from the salary of the Teacher the amount due to be paid by the Teacher under the terms of the State Teachers' Retirement System, which sum shall be paid to the Secretary of the State Teachers' Retirement System, within fifteen days from the date of the close of the school month.

15. This contract shall terminate if, at the beginning of any school term, the Teacher does not hold a valid teacher's certificate covering the period of such term; provided, however, that if at the end of the preceding school term the

Teacher shall have been the holder of a certificate then in force and effect, but which shall have thereafter expired, and if such certificate be eligible for renewal, and if renewal thereof shall have been prevented by personal illness of the Teacher, or by other just cause beyond the control of the Teacher, the Teacher shall have one year from and after the time of the expiration of such certificate in which to obtain a renewal certificate or a new certificate, and the operation of this contract shall be suspended for such period of one year.

16. The Teacher shall furnish the superintendent of the district, at regular periods designated by him, a complete list of the pupils between the ages of six and eighteen and a complete list of the pupils who should attend the school being taught by said Teacher but who were absent during the designated period.

17. The Board shall keep the school building in good repair, furnish the necessary fuel, furniture, apparatus, books, blanks, and such other appliances as may be necessary for the systematic and proper conduct of the school.

18. The Teacher accepts this contract of continuing employment subject to any shortening of the school term in any school year which may be made necessary because of lack of funds legally required to be paid to the Teacher.

19. The operation of this contract shall be suspended for such period or periods of time as the Teacher, by reason of prolonged illness, may be unable to perform the duties herein required of the Teacher.

20. The refusal of the Teacher to carry out and fulfill the agreements made herein shall be sufficient grounds for removal from service and cancellation of this continuing contract.

21. The operation of this contract, by mutual consent in writing of the parties hereto, may be suspended for periods not exceeding one year.

Witness the following signatures as of the day, month and year first above written:

.... Board of Education
Party of the First Part

By ...., Chairman

...., Secretary

...., Teacher
Party of the Second Part

CAN THIS TEACHER BE FIRED?

The first case below is that of a teacher who was not fired, but whose teaching certificate was revoked by the state board of education. Each of the other cases involves a teacher who was dismissed by a district board of education and appealed the dismissal to a court of law. For each such case, decide whether the court would uphold the dismissal. If so, upon what grounds? If not, why not?

1. ERB

Richard Erb was a military veteran, holder of a master's degree in fine arts, possessor of a teaching certificate, and taught art in a high school in Iowa, where he also coached wrestling, assisted with football, and acted as a senior class sponsor. Witnesses testified that he was highly successful in all these activities.

Margaret Johnson was a home economics teacher in the same school. Her husband filed a complaint against Erb, as follows:

> He suspected Margaret and Erb were meeting secretly and engaging in illicit activity in the Johnson automobile. One night he hid in the trunk of the car. Margaret drove the car to school, worked there for some time, and later drove to a secluded area in the country where she met Erb. Margaret and Erb had sexual intercourse in the back seat of the car while Johnson remained hidden in the trunk.

The evidence showed Erb to be a teacher of exceptional merit, dedicated, hardworking, and effective. There was no evidence to show that his affair with Margaret Johnson had an adverse effect upon his relationship with the school administration, fellow teachers, the students, or the community. The conduct itself was not an open affront to community mores; it became public only because it was discovered with considerable effort and made public by Johnson.

The board of education refused to fire Erb. Johnson demanded that the state board revoke Erb's certificate, and the state board complied. Erb went to court for the restoration of his certificate. Was he successful? Would it depend upon whether the court held the exemplar or the nexus theory?

2. CLARKE

James Clarke was a tenured junior high school teacher in Omaha. He said to several of his black students, who admittedly had been disruptive: "How many times a day do I have to ask you dumb niggers to stop playing around, stop talking and get to work?" Clarke obviously recognized that his statements were inappropriate because at the conclusion of the class he apologized to the rest of the class, saying: "I am sorry that the rest of the class, especially the three young ladies present, had to listen to this." The next day, Clarke had a further altercation with the black students, in which he kicked a chair out from under one student and invited the student to hit him: "I wish you would swing at me because then I would have to defend myself, and I would just love to make a black grease spot out of you on the floor." Both of these events were brought to the attention of the school administration, which confronted Clarke about the matter. Clarke admitted to the principal that he had made the remarks alleged by the students and conceded that his conduct and comments were inappropriate.

3. FLORIAN

James Florian was a wrestling coach and guidance counselor in a local school district in Ohio. He twice directed a freshman high school student, who was a member of the wrestling team, to lie and cheat during a wrestling tournament. In his capacity as head wrestling coach, Florian instructed the boy to weigh in under the weight class of another wrestler so that the latter, who was overweight, could wrestle in his weight class. When confronted with these allegations, Florian admitted his wrongdoing and voluntarily resigned as wrestling coach. The board of education then instituted proceedings to terminate his continuing teaching contract as well.

4. PEREZ

Augustin Perez was a tenured Spanish teacher at a high school in San Diego. Early in 1980 Perez began to lose control of his classroom and his students. Tardiness, inattention, siestas, talking in class, disdain for discipline, reading unrelated paperback books, and general goofing off characterized his students and the classroom environment. In April, two students set a rug afire. Perez did nothing about it. A student asked him for a pass and reported the fire to the vice principal.

On May 7 Perez received a summary evaluation report from the district rating him unsatisfactory in all categories--achievement of stated objectives, maintenance of proper control, preservation of suitable environment, and performance of other duties and responsibilities. The report noted Perez's failings: poor classroom control, disrespect shown to him by students, inadequate instruction, parental complaints that students were not learning the basics. Perez denied the complaints were valid and refused any assistance to deal with his problem.

The classroom environment did not change. The students decorated the walls with graffiti and came and went at their pleasure. Perez continued to conduct his classes interchangeably in English and Spanish contrary to district requirements, and the Spanish instruction was marred by incorrect grammar, spelling, faulty translations and lessons below the grade level of the students.

On January 9, 1981, another report rated Perez unsatisfactory in three areas, noted need for improvement in maintenance of classroom control and recommended a notice of incompetency and unprofessional conduct. On January 27 that notice was issued to Perez, advising him that he had failed to achieve performance objectives, to maintain classroom control, to maintain a suitable learning environment and appropriate relationships with students and parents. Perez did not respond to these reports. The students continued in control. On April 28 Perez again was evaluated and graded unsatisfactory on all counts. On May 12, the superintendent filed charges against Perez seeking his dismissal, and the board fired him on May 23, 1981.

5. ROSS

Robert Ross was a teacher of building trades at an area vocational school in Missouri. He frequently permitted male members of the class to engage in sexual harassment of the only female class member. While on a construction site with the class, Ross suggestively embraced the female. He allowed the students to place a suggestive centerfold on the wall of the classroom. He failed to discourage the use of obscene and sexually explicit language repeatedly directed toward the female student by other class members. He brought into the classroom a plastic phallus that was eventually used by the male students to harass and embarrass the female student. Although he knew which students had used the phallus to harass the female, he failed to take any disciplinary action against them.

6. LANDRY

Lloyd John Landry was a tenured teacher at a high school in Louisiana. While Landry was on duty supervising the boys' restroom area, he became involved in an incident, wherein a 16-year old student, Ray Jacob, accosted him and an argument ensued. Words were exchanged and a scuffle took place between them. The altercation proceeded into the hallway, where a group of students quickly gathered. Thereafter, the scuffle was broken up by the assistant principal, who told Jacob to go to the office. Jacob refused, wrapped his belt around his fist, threatened Landry, then left the area, returning shortly thereafter, armed with a two by four piece of wood, about 30 inches long. He attacked Landry, who dodged most of the blows. With Jacob in wild pursuit, Landry fled the building, ran to his automobile in the teachers' parking lot, unlocked the car, and obtained a pistol from the glove compartment. Then he stood in front of his vehicle with the pistol at his side. Jacob appeared in the area, still carrying the piece of wood, but retreated when he saw the teacher with his pistol in hand. The evidence shows that Landry made certain the pistol was visible, but did not point the gun at Jacob or anybody else. The principal thought Landry's behavior was justifiable, but the board, nevertheless, fired him.

7. BLACKBURN

T. O. Blackburn was a tenured teacher in Breckinridge County, Kentucky. By a letter dated May 12, 1975, he was notified that upon the superintendent's recommendation the board had terminated his contract for incompetency and inefficiency. On May 19 Blackburn notified the superintendent that he intended to contest the charges. At the hearing, held on June 5, Blackburn objected that the charges were not specific enough to enable him to prepare an adequate defense. His objections were overruled, but the hearing was recessed until June 19, when additional testimony was taken and the hearing concluded. On June 23 the board voted to terminate his contract.

Blackburn was not told before the hearing names, dates, occurrences, or other data upon which his supervisor relied to prove his inefficiency as a classroom teacher, although considerable evidence was presented at the hearing. He had been employed in the system for nine years, but the only written evaluation of his performance was conducted on April 25, 1975. At the hearing Blackburn was unable to remember his birthday, could not recall the names of ten of his students, and was unable to explain the meaning of certain commonly used terms.

8. KELLY

William Kelly was a tenured classroom teacher in Monticello, Kentucky. By a letter dated May 11, 1976, signed by the chairman and secretary of the board of education, Kelly was notified that the board was terminating his teaching contract. Among the charges was:

> Physical and mental disability, due to your repeated confinement in psychiatric wards and your frequent absences from classes. This includes the fact that you are presently under psychiatric treatment after being released from the psychiatric ward in Lexington.

A hearing before the board on these charges was set for June 10, and within ten days of the receipt of the notice, Kelly made a written response to the board that he intended to appear at the hearing. At the hearing Kelly was represented by counsel and objected that the charges against him were not in sufficient detail and objected to the hearing being prosecuted by the board's regular attorney. He questioned individual members of the school board to determine whether any of the members had formed an opinion of the truth of the charges against him. After this examination, Kelly asked each member of the board to disqualify himself since each had stated that he believed Kelly to be guilty, in some degree, of the charges. Each member refused to disqualify himself.

The evidence on behalf of the board was a statement by Dr. John Simmons, which informed the board that Kelly was unable to return to work until August 30, 1976, and then only on a part-time basis.

The superintendent testified that Kelly had been repeatedly absent from work. There was evidence that he had used some drugs and that he had been under psychiatric care. The superintendent testified that when he telephoned the Kelly residence on May 10, he was advised by the teacher's wife that Kelly was still a patient at the University of Kentucky medical center. On June 15, 1976, the board voted to terminate Kelly's teaching contract, and made written findings of fact in support of this decision, and found that he was physically and mentally unable to perform the duties of a full-time teacher.

Did Kelly receive timely notice? Were the charges against him sufficiently specific? Was the charge of disability supported by substantial evidence? Suppose Kelly had got another doctor to testify that he was able to return to his duties as a teacher. Would that have affected the outcome of the case? What about Kelly's claim that the board did not provide him a fair and impartial hearing because they had already made up their minds that he was guilty? What remedy was available to Kelly if the board was not impartial?

9. FOWLER

On the last day of the 1983-84 school year, Jacqueline Fowler, a tenured teacher in the Lincoln County (Kentucky) High School, showed her students an R-rated movie, Pink Floyd - The Wall. The film contained brief nudity and some alleged obscenities. A student who had previewed the film blocked out the nude scenes by holding a cardboard in front of the screen. The board of education fired Fowler, and she brought suit.

1. What cause listed in Kentucky statutes could the board use for dismissal of Mrs. Fowler, a tenured teacher?
2. In what court could Mrs. Fowler bring suit?
3. What could Mrs. Fowler's defense be?
4. What was the probable outcome of the case? Why?
5. What award should be made to the party winning the suit?
6. Could the decision of the court be appealed, and if so, to whom?

UNIT THREE

RELIGION AND THE SCHOOLS

I. GENERAL PROVISIONS

A. The police power of the state gives it the right to compel vaccination as a condition of school attendance. (Zucht v. King, 260 U.S. 174, 1922.)

B. The Fourteenth Amendment's protection of life, liberty, and property against arbitrary governmental action was the basis for several landmark decisions.

1. A state cannot require attendance at only public schools because this violates the rights of parents to educate their children and deprives private schools of their property. (Pierce v. Society of Sisters and Pierce v. Hill Military Academy, 268 U.S. 534, 1925.)

2. The state may make reasonable regulations for all schools, but cannot prohibit instruction that is not injurious to the interests of the state. (Meyer v. Nebraska, 262 U.S. 390, 1923.)

3. A state may loan textbooks to nonpublic school children. Such a loan is for the benefit of the child and does not constitute spending public funds for private purposes under the Constitution of the United States. (Cochran v. Louisiana State Board of Education, 281 U.S. 370, 1930.)

4. The "child-benefit theory" enunciated above is permissive. It does not mandate states to make such loans, nor override prohibitions against such in state constitutions or statutes.

II. FIRST AMENDMENT PROVISIONS

A. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof...."

B. The restrictions on Congress in the Bill of Rights have been extended by Supreme Court interpretation of the 14th Amendment to apply to all governmental agencies at all levels, including the public schools. (Cantwell v. Connecticut, 310 U.S. 296, 1940.)

C. The term "no law" has not been interpreted literally; certain exceptions are permitted.

III. ESTABLISHMENT CLAUSE

A. Use of government funds to support or contribute to parochial or other religious schools.

1. States may provide services - such as textbook loans, subsidized lunches, bus transportation - to pupils attending religious schools under the theory that these services are for the benefit of the child rather than the school.

2. In order to be constitutional, a statute providing such aid must meet all three parts of the so-called Lemon test; that is, it must:

    a. Have a secular legislative purpose;

    b. Have a practical effect that neither advances nor inhibits religion;

    c. Not foster excessive government entanglement with religion.

3. States may loan textbooks to students attending private and parochial schools. (Cochran v. Louisiana, Supra., and Board of Education v. Allen, 392 U.S. 236, 1968.)

    a. States cannot loan textbooks to students attending racially segregated schools. (Norwood v. Harrison, 413 U.S. 455, 1973.)

    b. State constitutional provisions prohibiting use of public funds to aid religious schools are not violative of the U.S. Constitution. (Wheeler v. Barrera, 417 U.S. 402, 1974.)

4. States may provide free bus transportation to students attending parochial schools. (Everson v. Board of Education, 330 U.S. 1, 1947.)

5. States cannot reimburse nonpublic schools for the purchase of secular educational services or pay salary supplements to teachers of secular subjects in nonpublic schools. (Johnson v. Sanders, 403 U.S. 955, 1971, and Lemon v. Kurtzman and DiCenso v. Robinson, 403 U.S. 602, 1971.)

6. A state may not reimburse a nonpublic school for the costs of developing, administering and scoring internally prepared tests, even though a testing program is mandated by the state. (Levitt v. Committeee for Public Education and Religious Liberty, 413 U.S. 472, 1973.)

7. A state, however, may reimburse nonpublic schools for the costs of administering state-prepared examinations and for attendance reporting. (Committee for Public Education and Religious Liberty v. Regan, 444 U.S. 646, 1980.)

8. A law authorizing the state to provide all secular services to nonpublic school children as are provided to public school children was declared unconstitutional. (Meek v. Pittenger, 421 U.S. 350, 1975.)

9. The Supreme Court held constitutional those portions of an Ohio statute authorizing the state to provide nonpublic school pupils with books, standardized testing and scoring, diagnostic services (speech, hearing, and psychological), and therapeutic, guidance, and remedial services (offered on a neutral site off school premises). (Wolman v. Walter, 433 U.S. 229, 1977.)

10. The Court held unconstitutional those portions of the Ohio law relating to instructional materials and equipment and field trip services. (Wolman v. Walter, supra.)

11. Tuition grants to parents of children attending private schools have been stricken down. (Sloan v. Lemon, 413 U.S. 825, 1973, and Committee for Public Education v. Nyquist, 413 U.S. at 761, as well as several cases where the purpose was to avoid desegregation.)

12. A Minnesota law allowing taxpayers, in computing state income taxes, to deduct certain expenses incurred in education of their children, including tuition costs, was upheld by the Supreme Court. (Mueller v. Allen, 463 U.S. 388, 1983.)

13. The New York City Chapter 1 Program, which assigned public school teachers to provide remedial instruction to students in religious schools, was ruled unconstitutional. (Aguilar v. Felton, 105 S.Ct. 3232, 1985.)

14. Likewise, a shared time program in Michigan under which public school teachers performed remedial work in religious schools was declared unconstitutional. (Grand Rapids v. Ball, 105 S.Ct. 3248, 1985.)

15. A law permitting tax exemption for nonprofit religious, educational, or charitable enterprises is not establishment of religion. (Walz v. Tax Commission, 397 U.S. 664, 1970.)

B. Introduction of Religious Instruction or Worship Into Public Schools

1. Excuse from School Sessions for Religious Purposes

a. A public school program that excused students from regular classes to attend religious instruction in the school building violated the Establishment Clause. (McCollum v. Board of Education, 333 U.S. 203, 1948.)

b. Dismissing students from school early to receive religious instruction off the school grounds is constitutional. (Zorach v. Clausen, 343 U.S. 306, 1952.)

c. The distinction between the two cases was that school property was used in the McCollum case and not in Zorach.

2. School Prayer and Bible Reading

a. Recitation of prayer as part of a public school exercise, even though voluntary and "nondenominational," is a religious exercise and unconstitutional. (Engel v. Vitale, 370 U.S. 421, 1962.)

b. Statutes or school board regulations that provide for voluntary Bible reading or voluntary recitation of the Lord's Prayer are unconstitutional as establishment of religion. (School District of Abington v. Schempp and Murray v. Curlett, 347 U.S. 203, 1963.)

c. A state statute calling for a period of silent meditation or prayer as part of the school's opening exercises is unconstitutional if enacted for the purposes of promoting religion. (Wallace v. Jaffree, 105 S. Ct. 2479.)

d. A Kentucky statute (KRS 158.175) authorizing the recitation of the Lord's Prayer is unconstitutional.

3. Display of the Ten Commandments

A law (KRS 158.178) requiring the display of a copy of the Ten Commandments on a wall in each public school classroom in Kentucky is unconstitutional. (Stone v. Graham, 449 U.S. 39, 1980.)

4. Religious Observances

a. Schools may teach about religion as a significant part of our culture and history.

b. The performance of religious music, art, or literature is permissible if the primary purpose served is secular and not religious.

c. Short term display of religious symbols, such as the Nativity Scene at Christmas time, is acceptable if done in an objective manner as a traditional part of the cultural heritage of that particular holiday.

d. Christmas programs that are predominantly religious in character violate the Establishment Clause. (Florey v. Sioux Falls School District, 619 F. 2d 1311, 8th Cir, 1980.)

e. Courts are divided on the propriety of including religious elements in public school graduation exercises.

f. A federal appeals court has ruled that broadcasting Christian prayer over a loudspeaker at public high school football games is unconstitutional. The Supreme Court has refused Certiorari. (Douglas County School District v. Jager, 57USLW3670, 1989.)

5. Student Prayer Groups

a. A state university that makes its facilities available as a public forum for student groups cannot prohibit such groups from using the facilities for religious activities. The student interest in freedom of speech outweighs the university's interest in avoiding promotion of religion. (Widmar v. Vincent, 454 U.S. 263, 1981.)

b. The rationale of Widmar does not apply to public elementary or secondary schools where an open forum does not exist, the students are of an impressionable age, and the state has a compelling interest in avoiding sponsorship of religious activity. (Brandon v. Board of Education, 635 F. 2d. 971, 2nd Cir, 1980.)

c. Because of a technicality the Supreme Court of the United States refused to say whether an organization of students described as a "nondenominational prayer fellowship" could meet in the school building prior to the start of the school day. (Bender v. Williamsport Area School District, 475 U.S. 534, 1986.)

IV. FREE EXERCISE CLAUSE

A. The free exercise of religion is not an absolute right, but one that must be balanced against competing rights.

1. The incidental detriment rule permits the courts to uphold laws promoting general governmental interests that may be incidentally detrimental to religion. (e.g., Sunday closing laws that are detrimental to Orthodox Jews or Seventh Day Adventists.)

2. Regulation is not the same as infringement. Freedom to believe is absolute; freedom to act is not. (e.g., snake handling, solicitation of funds, violation of child labor laws.)

B. Freedom of religion also includes freedom of conscience, whether based upon religious belief or other deep personal conviction.

1. Requiring public school pupils to salute the flag and/or recite a pledge of allegiance is unconstitutional. (Barnette v. West Virginia, 319 U.S. 624, 1943.)

2. Students who do not wish to participate in the flag salute or pledge of allegiance cannot be required to stand (Banks v. Board of Public Instruction, 314 F. Supp. 285, S.D. Fla. 1970) nor to leave the room during the ceremony (Frain v. Baron, 307 F. Supp. 27, E.D. N.Y. 1969.)

3. Public school students cannot be required to take ROTC training. (Spence v. Bailey, 465 F. 2d 797, 6th Cir. 1972.)

4. Compulsory school attendance laws may be vulnerable to religious objection.

    a. The Supreme Court held that certain Amish children in Wisconsin must be exempted from that state's compulsory attendance law. (Wisconsin v. Yoder, 406 U.S. 205, 1972.)

    b. The Yoder decision does not apply to all religiously-based objections to compulsory schooling, only to situations where the facts are similar.

    c. Kentucky's compulsory attendance laws are constitutional, but enforcement is difficult due to interpretations of the Rudasill decision discussed below. (Kentucky State Board for Elementary and Secondary Education v. Rudasill, 489 S.W. 2d 877, 1979.)

    d. An Equal Access Act (P.L. 98-377) passed by Congress in July, 1984, requires public secondary schools that receive federal aid to allow religious, political or other student groups to meet on school premises if they allow other non-curricular groups to do so. The constitutionality of this act has been challenged in the courts. (Westside Community Schools v. Mergens 57 USLW 3229, 1989.) The Supreme Court will review this case in its 1989-90 term.

V. OTHER ISSUES AND SUMMARY

A. Evolution/Creationism

1. In the famous "monkey trial" in Tennessee in 1927 a teacher was convicted of violating a law forbidding the teaching of evolution. (Scopes v. State of Tennessee, 289 S.W. 363, 1927. The Tennessee legislature later repealed its anti-evolution law.)

2. A subsequent Tennessee statute prohibited the use of any textbook that discussed evolution unless there was a disclaimer that the doctrine was only a theory and not scientific fact. The law defined the Holy Bible as a reference work not required to carry a disclaimer on the Genesis version of creation. This law was declared unconstitutional as it gave a preferential treatment to the Biblical version of creation. (Daniel v. Waters, 515 F. 2d 485, 6 Cir. 1975.)

3. An Arkansas law prohibiting the teaching of evolution was ruled unconstitutional by the Supreme Court in 1968. (Epperson v. Arkansas, 393 U.S. 97, 1968.)

4. A Louisiana law requiring a "balanced treatment" of evolution and scientific creationism was struck down as an unconstitutional establishment of religion. (Edwards v. Aguillard, 107 S. Ct. 2573, 1987.)

B. Secular Humanism

1. Secular humanism is an ideology or philosophy (perhaps a religion) that has points of view about human reasoning morality, which of course are central concerns of many religions.

2. For public schools to inculcate these points of view systematically would violate religious neutrality. Teaching and encouraging children to reason, however, is a legitimate educational goal. Does such teaching violate the First Amendment?

3. In 1986 a federal district court in Tennessee ruled that parents who believed a public school reading series fostered secular humanism could remove their children from that part of the curriculum and teach them reading through alternative means. This decision was overturned by the Sixth Circuit Court of Appeals. (Mozert v. Hawkins, 827 F.2d 1058, 6 Cir., 1987.)

4. In 1987 a federal district judge in Mobile, Alabama, ruled that secular humanism is a religion, and that dozens of books commonly used in the Alabama public schools were promoting that religion by systematically omitting other religious material and by urging children to form their own values and reach their own conclusions about right and wrong. He ordered that the books be removed from all public schools in Alabama. This decision was overturned by the Eleventh Circuit Court of Appeals. (Smith v. Mobile, 827 F.2d 684, 11th Cir., 1987.)

C. Summary

Government must maintain neutrality toward religion.

1. Government must not advance nor inhibit religion.

2. Government must not show preference for any religion over another.

3. Government must not favor religion over non-religion or vice versa.

4. Government must respect all religious belief or unbelief.

SUPPLEMENT TO UNIT THREE

TEST YOURSELF

Religion and Public Schools

1. May a school sponsor the study of religion?
2. May a school sponsor the practice of religion?
3. May a school expose students to all religious views?
4. May a school impose one particular religious view?
5. May a school provide instruction about religion?
6. May a school provide indoctrination in religion?
7. May a school educate about all religions?
8. May a school convert students to any one religion?
9. Should a school study what all people believe?
10. Should a school teach students what to believe?
11. Should a school strive for student awareness of all religions?
12. Should a school press for student acceptance of any one religion?
13. Can teachers be excused from saluting the flag?
14. Can a teacher refuse to follow the curriculum if the refusal is based on religious beliefs?
15. Can a Jehovah's Witness be qualified to teach in the public schools?
16. Must schools pay teachers for religious holiday leaves?
17. Can teachers take religious holiday leaves?
18. Can teachers take unlimited religious holiday leaves at will?
19. Can nuns teach in public schools?
20. Do teachers have unlimited freedom to wear religious garb when teaching in the public schools?

(Answers: Odd numbered questions - "Yes, if done reasonably."
Even numbered questions - "No.")

CASES

THE FREE EXERCISE CLAUSE AND THE SCHOOLS

1. The state of Wisconsin has a compulsory school attendance law that requires a child's attendance at school until age sixteen. Members of the Old Order Amish and the Conservative Amish Mennonite Church refused to send their fourteen and fifteen-year-old children to public or private school, because they sincerely believe that high school attendance (after the eighth grade) is contrary to their religious beliefs and to their way of life. The Amish live apart from the community at large, and Old Order Amish shun modern conveniences such as automobiles and modern farm machinery. Some even shun electricity in their homes as also being "too worldly." They believe that children between the ages of fourteen and sixteen should be devoting more time to Bible study and to training at home for the farm work and other jobs within the Amish community. If their children attended high school beyond eighth grade, they believe it would endanger their salvation.

   State officials prosecuted several Amish families for refusing to send their children to school. The parents were convicted and fined a small amount. The Wisconsin Supreme Court overturned their conviction. Wisconsin then appealed to the U.S. Supreme Court.

   *Does the Free Exercise Clause of the First Amendment prevent Wisconsin from prosecuting the Amish for not sending their children to school?

   *If these parents are exempt from compulsory attendance laws, does this then violate the Establishment Clause? In other words, will Wisconsin then be showing preference for one religion - the Amish - over other religions? Why or why not?

2. In 1942 the West Virginia Board of Education adopted a resolution making the salute to the flag a "regular part of the program of activities in the public schools" and required all school teachers and children to recite the pledge of allegiance. Failure to do so would "be regarded as an act of insubordination, and shall be dealt with accordingly" - explusion from school. If a child refused to salute the flag and was sent home, he or she would be considered illegally absent, could be considered delinquent, and the parent could be fined. A student could only return to school if he or she saluted the flag in the classroom.

For Jehovah's Witnesses, being required to salute the flag meant that they would have to violate their religious beliefs. They followed the second of the Ten Commandments literally, as stated in the Book of Exodus 20:4-5 of the Bible: "Thou shalt not make unto thee any graven image, or any likeness or anything that is in heaven above, or that is in the earth beneath, or that is in the water under the earth; thou shalt not bow down thyself to them nor serve them..." To the Jehovah's Witnesses the class exercise of pledging allegiance to the flag was forcing their children to "bow down to a graven image."

Rather than disobey their religious convictions, the Witnesses offered to recite "periodically and publically" a substitute pledge that conformed to their religion. It said, "I respect the flag of the United States and acknowledge it as a symbol of freedom and justice to all. I pledge allegiance and obedience to all the laws of the United States that are consistent with God's laws, as set forth in the Bible."

In the fall of 1942 in a school on the outskirts of Charleston the principal sent home some children who refused to say the required pledge. The next day Marie Barnette, her sister and cousins went back to school, but when they again refused to salute the flag, they were sent home again. The children went back to school the next day, and the same thing occurred. In fact, officials even threatened to send some of the children to reformatories.

Jehovah's Witnesses Mr. and Mrs. Walter Barnette, whose two daughters were among seven who were expelled from school, brought their case before the federal District Court in Charleston. The West Virginia Board of Education argued that their purpose for the policy was to promote national unity. The lawyers for the Jehovah's Witnesses claimed that the board policy was contrary to the First and Fourteenth Amendments to the Constitution. The West Virginia Board of Education lost their case at the district level, and they immediately appealed to the Supreme Court.

THE ESTABLISHMENT CLAUSE AND PUBLIC SCHOOLS

In cases involving the Establishment Clause of the First Amendment, Supreme Court Justices will apply guidelines to test the constitutionality of a governmental law or activity. One set of guidelines is the Lemon three-part test. (See Page 55.) Another is the "strict scrutiny" test, where governments must show a "compelling interest" to justify laws that infringe on religious beliefs. A third test was the "child benefit" test, used in the past in cases involving aid to parochial schools. Apply the Lemon criteria to the following cases dealing with religious activities in the public schools. Remember - if even one of the three parts of the test is violated, the law is unconstitutional.

1. In 1978 the Kentucky General Assembly enacted KRS 158.178, which placed the duty upon the Superintendent of Public Instruction to post a copy of the Ten Commandments in every public elementary and secondary school classroom in the Commonwealth. The law even specified the dimensions of the copy: sixteen (16) inches wide by twenty (20) inches high. The statute made this duty conditional upon the receipt of voluntary contributions made for such purpose to the state treasury. The General Assembly recognized the possible violations of the principle of the segregation of church and state and attempted to handle this by requiring a declaration to be placed on all copies "in a small print below the last Commandment." This declaration read, "The secular application of the Ten Commandments is clearly seen in its adoption as the fundamental legal code of western civilization and the Common Law of the United States.

   The Commonwealth sought an opinion from the Attorney General concerning the statute. In OAG 78-605 the Attorney General stated the law was constitutional. After this, an organization called the Kentucky Heritage began to solicit private funds to have copies of the Ten Commandments printed and posted in public school classrooms throughout the state. The organization raised over $150,000 and had 15,000 framed copies placed in all classrooms in 55 counties and in some rooms in 48 other counties.

   A group consisting of a Quaker, a Unitarian, a non-believer, a mother of school-age children and a public school teacher, two children of compulsory school age attending the public schools, and a Jewish Rabbi sought an injunction to stop the state from enforcing KRS 158.178 on the basis that it was unconstitutional. They argued that the First Amendment to the Federal Constitution, as applied to the states through the Fourteenth Amendment, was violated by this law.

2. Can states require students to participate in voluntary prayers or in a moment of silence at the start of the school day? This issue was asked in a lawsuit filed by a Mobile, Alabama, attorney. Ishmael Jaffree, an agnostic, first filed suit because he opposed the practice of saying grace before lunch begun by the teachers in the Mobile elementary schools which his three children attended. Soon thereafter in 1982 Alabama Governor Fob James called the legislature into special session. During this session a law was passed authorizing public school teachers and college professors to lead prayers at the start of class sessions. The law even included a sample prayer (written by the Governor's son). Jaffree added to his lawsuit this 1982 prayer statute and another Alabama law that permitted Alabama teachers to announce at the beginning of the school day a moment of silence or voluntary prayer. Thus, Jaffree was challenging the constitutionality of three actions: first, vocal prayers conducted by Alabama teachers; second, the governor's prayer law; and third, the moment of silence law.

   Jaffree lost in the U.S. District Court that first heard the case. Judge W. Brevard Hand decided that the Supreme Court had been erroneously interpreting the Constitution for years. Judge Hand said that the First Amendment "does not bar the states from establishing a religion." Jaffree won his case on all counts in the court of appeals, and the court granted a permanent injunction against vocal prayers. Alabama did not appeal this injunction, but did appeal the rest of the decision to the Supreme Court. There the Justices summarily overturned the law allowing teachers to lead students in spoken prayer. However, they agreed to consider the "moment of silence" law.

   Before the high court, Jaffree's lawyers argued that the Alabama law violated two parts of the Lemon test. The state of Alabama argued for "accommodation" of the Establishment Clause to religious beliefs and practices. (This view holds that the Founding Fathers were opposed only to a national religion and the preference of one religious group over another).

   Questions to consider:
   A. Why did the Justices so quickly overturn the law allowing teachers to lead spoken prayers?
   B. Which two parts of the Lemon test do you think Jaffree's lawyers used to support their case?
   C. Applying the Lemon test, how would you decide this issue?

3. An organization known as STAND UP FOR JESUS, INC. wanted to distribute religious literature in the public schools of Madison County, Kentucky. The organization suggested a set of guidelines as follows:

   A. Only religious literature can be distributed to school children during one day in each school year;
   B. The handouts will occur on school property;
   C. Non-school personnel of any denomination or organization may distribute the material;
   D. Students whose parents object can not receive literature;
   AND
   E. Students are free to accept or reject the literature.

   In order to test the constitutionality of the guidelines, the Board of Education refused to permit the organization to distribute the literature, whereupon it sued the Board in Madison Circuit Court.

   Apply each of the three prongs of the Lemon test.
   Are the guidelines constitutional?

EQUAL ACCESS CASES
THE LEGAL DEBATE OVER STUDENT RELIGIOUS MEETINGS

As you may have discovered in your readings, the various clauses of the First Amendment could come into conflict with one another. The following cases illustrate this more clearly.

The issue in the following cases is this: Can public school officials ban meetings by student religious clubs in public secondary schools? Or, should the Supreme Court allow voluntary prayer meetings by students on the campuses of public high schools and state universities? The Supreme Court has held that required religious exercises, such as the reading of the Bible and the recitation of the Lord's Prayer in the public schools, violate the Establishment Clause of the First Amendment. But what about voluntary religious exercises? Analyze the following cases below, using the Lemon criteria to determine if voluntary meetings of a religious nature in public schools violate the Establishment Clause. Other questions to consider in addition to applying the three-part test:
*What other First Amendment rights of the students in these cases must also be considered? (Note that the students claim other rights have been denied them in each case below.)
*What are the similarities in these cases?
*Are there any differences in these cases that might be important?

1. The University of Missouri at Kansas City provided facilities for meetings of officially registered student organizations. A group of fundamentalist Christian students in an organization called Cornerstone received permission to use school facilities from 1973-1977 to hold religious meetings. About twenty students formed the heart of the club. Their meetings were open to the public and attracted up to 25 students. These meetings included prayer, hymns, Bible reading and discussion of religious experiences and views. The students had paid a $41 a semester activities fee. In 1977 the group was informed that they could no longer meet in school buildings. The reason given to them was that there was a 1972 university rule prohibiting the use of school facilities "for purposes of religious worship or religious teaching."

2. A number of students at Guilderland High School in New York formed a group called "Students for Voluntary Prayer," and they asked their principal for permission to conduct prayer meetings at their school before the official school day began. The principal and later the superintendent of schools and the board of education turned down their request. The reason they gave was the Establishment Clause; to give them permission would be to violate the Constitution of the United States. The students sued, arguing that their case involved several constitutional rights. They said they wanted the right to participate in a voluntary school activity, to which other students were entitled without benefit of faculty sponsors or advisors. A U.S. District Court dismissed the complaint of the students. The students appealed.

3. In Lubbock, Texas, during the 1970's the Lubbock School District allowed teachers to lead students in Bible readings and prayers over the school's intercom system. When this practice was challenged in the courts, school officials agreed to abolish this policy. Nevertheless, the practices continued for eight more years. With the threat of another court challenge looming over them, the school officials adopted a new policy that allowed student religious groups to use the school buildings for meetings before and after school hours "so long as attendance at such meetings is voluntary." The constitutionality of this policy was also challenged in court.

4. The Williamsport (Pennsylvania) Area School District's high school had regularly scheduled activity periods that met after the school day began. These were voluntary club periods, and groups that desired to meet then had to receive administration approval for their club. Each club had to be supervised by a teacher. In September, 1981, several students decided to use the extracurricular club period for religious meetings - to pray and read and discuss Biblical scriptures. "They formed a "nondenominational prayer fellowship" that they called Petros (The Rock), which would be open to all interested students. The students said in a written statement to the school that their purpose in organizing this club was to "meet for the purposes of (students) aiding each other in his social, emotional, and intellectual personal growth and development by prayer, the application of God's Holy Word to their problems, and sharing of personal experiences." The group was allowed to hold one meeting which forty-five students attended. Then the school administration checked with their attorney about the legality of this type of meeting and later banned further meetings for fear of violating the Establishment Clause.

   In June, 1982, several students and their parents sued on the grounds that several of their constitutional rights had been denied them by school officials. The district court found in favor of the students, but on appeal the Third Circuit Court of Appeals reversed this decision. The court of appeals recognized the conflict of constitutional rights between the school and the students. The students had First and Fourteenth Amendment rights, but the school had the responsibility to maintain the separation of church and state. The court decided that the state had a compelling interest in this situation to restrict the students' rights in the "limited public forum" of the activity period.

   The court of appeals ruling was handed down in July, 1984. Shortly after this ruling, the Congress passed the Equal Access Act. President Reagen signed this bill into law in August, 1984. This law requires public schools to provide all student organizations or student-initiated groups with equal access to school facilities. Where schools that receive federal financial assistance and have a "limited open forum" where other noncurricular groups meet during noninstructional hours, there can be no discrimination against student religious groups - no discrimination against the content of the student speech involved. (See text of Equal Access Act at the end of this Supplement.)

The Supreme Court agreed to hear this case. The Reagan administration filed an amicus curiae (friend-of-the-court) brief on behalf of the students, because the issue has thrown the constitutionality of the Equal Access Act into doubt.

If you were on the Supreme Court, how would you decide?

CREATION SCIENCE CASES

1. In 1973 the state legislature in Tennessee passed a law restricting science textbooks that could be used in the public schools in Tennessee. Any textbook that dealt with the Darwin's theory of evolution had to have a disclaimer stating that evolution was a "theory" and not "scientific fact." In addition, any text that dealt with "the origin and creation of man" had to provide equal attention to other theories, including, though not limited to, the Biblical account as found in the Book of Genesis. The law defined the Bible as a "reference work," not as a textbook, and the Bible account did NOT have to have the same disclaimer as the evolution account did. The Tennessee law went further to exclude the necessity of teaching about "occult or satanical beliefs of human origin."

   The Sixth Circuit Court of Appeals applied the Lemon three-part test to evaluate the constitutionality of the "Tennessee Genesis Law." Using these same criteria, how would you decide this case?

2. Arkansas was the site for the famous Supreme Court case in 1968 of Epperson v. Arkansas, when a Little Rock Central High School biology teacher, Susan Epperson, challenged Arkansas' anti-evolution law as violation of the First and Fourteenth Amendments. The Supreme Court said that just because a state has the right to set the curriculum does not give it the right to ban teaching a scientific theory for the only reason that it seems to conflict with the beliefs of certain religious beliefs.

   In 1981 Arkansas passed a new law that required the "balanced treatment to creation science and to evolution science." The law did not mention at all the Bible, Genesis, or religion. It defined creation science as the scientific creationism organizations do (such as the Institute for Creation Research in San Diego). Thus, creation science is defined as the sudden creation of the universe from nothing, the belief in a world wide flood, and separate ancestries for man and apes. This new Arkansas law was also challenged on First Amendment grounds.

TEXT OF EQUAL ACCESS AMENDMENT

The following is the text of the Equal Access statute as enacted by Congress and sent to President Reagan on July 25, 1984. 20 U.S.C. 4071

Sec. 802(a). It shall be unlawful for any public secondary school which receives Federal financial assistance and which has a limited open forum to deny equal access or a fair opportunity to, or discriminate against, any students who wish to conduct a meeting within that limited open forum on the basis of the religious, political, philosophical, or other content of the speech at such meetings.

(b) A public secondary school has a limited open forum whenever such school grants an offering to or opportunity for one or more noncurriculum related student groups to meet on school premises during noninstructional time.

(c) Schools shall be deemed to offer a fair opportunity to students who wish to conduct a meeting within its limited open forum if such school uniformly provides that—

(1) the meeting is voluntary and student-initiated;

(2) there is no sponsorship of the meeting by the school, the government, or its agents or employees;

(3) employees or agents of the school or government are present at religious meetings only in a nonparticipatory capacity;

(4) the meeting does not materially and substantially interfere with the orderly conduct of educational activities within the school; and

(5) nonschool persons may not direct, conduct, control, or regularly attend activities of student groups.

(d) Nothing in this title shall be construed to authorize the United States or any State or political subdivision thereof—

(1) to influence the form or content of any prayer or other religious activity;

(2) to require any person to participate in prayer or other religious activity;

(3) to expend public funds beyond the incidental cost of providing the space for student-initiated meetings;

(4) to compel any school agent or employee to attend a school meeting if the content of the speech at the meeting is contrary to the beliefs of the agent or employee;

(5) to sanction meetings that are otherwise unlawful;

(6) to limit the rights of groups of students which are not of a specified numerical size; or

(7) to abridge the constitutional rights of any person.

(e) Notwithstanding the availability of any other remedy under the Constitution or the laws of the United States, nothing in this title shall be construed to authorize the United States to deny or withhold Federal financial assistance in any school.

(f) Nothing in this Act shall be construed to limit the authority of the school, its agents or employees, to maintain order and discipline on school premises, to protect the well-being of students and faculty, and to assure that attendance of students at meetings is voluntary.

Sec. 803. As used in this title—

(1) The term "secondary school" means a public school which provides secondary education as determined by state law.

(2) The term "sponsorship" includes the act of promoting, leading or participating in a meeting. The assignment of a teacher, administrator, or other school employee to a meeting for custodial purposes does not constitute sponsorship of the meeting.

(3) The term "meeting" includes those activities of student groups which are permitted under a school's limited open forum and are not directly related to the school curriculum.

(4) The term "noninstructional time" means time set aside by the school before actual classroom instruction begins or after actual classroom instruction ends.

Sec. 804. If any provision of this title or the application thereof to any person or curcumstances is judicially determined to be invalid, the provisions of the remainder of the title and the application to other persons or circumstances shall not be affected thereby.

Sec. 805. The provisions of this title shall supersede all other provisions of Federal law that are inconsistent with the provisions of this title.

UNIT FOUR

FIRST AMENDMENT RIGHTS OF TEACHERS

I. First Amendment

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."

(The restrictions on Congress in the Bill of Rights have been extended by Supreme Court interpretation of the 14th Amendment to apply to all governmental agencies at all levels, including the public schools.)

(The term "no law" has not been interpreted literally; certain exceptions are permitted.)

A. Religion

The First Amendment rights of teachers in relation to religion are discussed in Unit Three, above.

B. Expression

1. The intent of the amendment is to protect the communication of ideas through any medium. Types of expression protected include:

    a. Speech

    b. Press (anything written)

    c. Technological (radio, television, movies, etc.)

    d. Symbolic (armbands, insignia, buttons, emblems, gestures - if they communicate a thought or idea)

    e. Silence in the face of an illegitimate demand for speech

2. Types of expression not protected are:

    a. Obscenity

        (1) In order for literature to be classified as obscene, the average person, applying contemporary community standards would find that:

(a) The work, taken as a whole, appeals to the prurient interest;

(b) The work depicts or describes, in a patently offensive way, sexual conduct specifically defined by applicable state law; and

(c) The work, taken as a whole, lacks serious literary, artistic, political, or scientific value. (Miller v. California, 413 U.S. 15, 1973.)

(2) Although juries may apply local community standards rather than national or statewide standards, they do not have unbridled discretion and cannot go beyond banning "hard core pornography." (Jenkins v. Georgia, 94 S.Ct. 2750, 1974.)

(3) A more stringent standard may be applied for testing the obscene nature of materials distributed to minors than would be applied to materials restricted to adults only. (Ginsberg v. New York, 390 U.S. 629, 1968.)

b. Defamation - May be written (libel) or oral (slander). A person who has been maligned may recover damages through civil action.

(1) Defamation involves the communication to third persons of statements which injure one's reputation. (No injury, no defamation.)

(2) Truth is a defense against defamation, the burden of truth being on the defendant.

(3) If the person maligned is a public figure or if the person making the statement is acting within the scope of his duties, truth need not be proven. In such cases the defendant need only show that he was not acting maliciously and that the statement was not knowingly or recklessly false. (New York Times v. Sullivan, 376 U.S. 254, 1974.)

(4) Teachers have a conditional privilege to communicate through official channels derogatory statements, following the criteria in (3) above.

(5) The conditional privilege does not extend to gossip in the teachers' lounge, in public, or even in a private home - only to official channels.

c. Clear and present danger to public safety and welfare. (Schenck v. United States, 249 U.S. 47, 1919.)

(1) Inciting a riot.

(2) Provoking a panic.

(3) Using "fighting words." (Chaplinsky v. New Hampshire 315 U.S. 568, 1942.)

(4) Disrupting lawful activity.

(5) Advocating the commission of a violent crime or the overthrow of the government by force and violence. (Brandenburg v. Ohio 395 U.S. 44, 1969. Scales v. United States, 367 U.S. 203, 1961.)

(The doctrine does not require that the riot, panic, fight, or disruption actually occur - only that there is substantial danger of a material disruption.)

(However, mere abstract teaching of moral necessity for resort to violence is not the same as preparing a group for violent action and leading it toward such action. Noto v. United States, 367 U.S. 290, 1961.)

3. Additional types of expression by teachers as teachers not constitutionally protected are:

a. Use of the classroom to promote religious or political views.

b. Use of class time for extended discussion of matters not related to the curriculum.

c. Expression as an employee upon matters of purely personal concern as contrasted to expression as a citizen upon matters of public interest. (Connick v. Myers, 103 S. Ct. 1684, 1983.)

4. Examples of cases where freedom of expression by teachers was upheld by the courts:

   a. A non-union teacher who spoke briefly at an open school board meeting in opposition to one demand by the union, despite a rule against school boards negotiating with individual teachers. (Madison v. Wisconsin Employment Relations Commission, 429 U.S. 950, 1976.)

   b. A teacher who criticized the policies and practices of the school district in a series of private conversations with the school principal. (Givhan v. Western Line Cons. School District, 435 U.S. 950, 1979.)

5. Examples of cases where school boards were upheld in restricting teachers' freedom of expression:

   a. A teacher was discharged for using class time to promote teacher union activity. (Knarr v. Board of School Trustees, 317 F. Supp. 832 N.D. Ind., 1970.)

   b. The contract was not renewed of a teacher who delivered abusive and defamatory remarks toward his superiors, including a patent suggestion that the superintendent was a liar. (Jones v. Battles, 315 F. Supp. 601, D. Conn., 1970.)

C. Assembly and Petition

1. The word "peaceably" in the First Amendment assures that the right of assembly is not absolute.

2. The right of assembly implies a right of association.

3. The right not to attend an assembly in face of an illegitimate demand for attendance is protected.

4. A school board may not suspend regularly scheduled classes to allow teachers and students to attend a political rally. (Nistad v. Board of Education, 304 N.Y.S. 971, 1969.)

5. A teacher cannot be punished for petitioning school authorities for permission to sponsor an outside political symposium. (Petition of Davenport, 283 A. 2d 452, 1971.)

6. The same court that upheld a teacher's right to petition for leave to attend an outside rally also upheld the punishment of two teachers who attended the rally without permission in defiance of superiors' orders. (Ibid.)

D. Freedom of Association

1. Source and extent

   a. An individual may not be deterred from or punished for joining or forming associations, whether they are political, labor-oriented, or purely social in nature.

   b. The same rights to and limitations upon freedom of expression apply to associations as to individuals.

   c. There is no direct provision in the Constitution pertaining to the right of association, which is derived from the constitutional rights of assembly and petition, supplemented by due process concepts.

   d. The right of association is not absolute; it does not apply to an alliance for wrongdoing which would be detrimental to the general welfare.

2. "Subversive" association

   a. Because of the nature of the teaching profession, wherein the teacher has great influence in developing future citizens, the states have taken great interest in the loyalty of teachers.

   b. Several states have enacted statutes designed to safeguard national security by preventing subversive activites in the schools. There are two types:

      (1) Loyalty oaths;

      (2) Dismissal of teachers affiliated with subversive organizations.

   c. Constitutionality of loyalty oaths

      (1) A state may require a teacher to take a so-called positive loyalty oath - that he swear or affirm that he will support the U. S. and state constitutions. (Knight v. Board of Regents, 390 U.S. 36, 1968.)

(2) States may not require teachers to take oaths that are too broad or too vague. (Cramp v. Board of Education, 368 U.S. 278, 1961.)

d. Subversive organizations

(1) A state cannot require a teacher to disclose all of his associational memberships. (Shelton v. Tucker, 364 U.S. 479, 1960.)

(2) No penalties can accrue to a teacher for membership in a subversive organization unless it can be shown that the teacher joined for the specific intent of furthering its unlawful activities. (Elfbrandt v. Russell, 384 U.S. 11, 1966.)

3. Association in private

a. Purely private association is protected by the First Amendment.

(1) A school board could not discipline a teacher for marrying a civil rights activist. (Randle v. Indianola Sep. School District, 373 F. Supp. N.D. Miss., 1974.)

(2) Without furnishing proof of immorality, a board could not discipline a teacher for entertaining male guests in her apartment overnight. (Fisher v. Snyder, 346 F. Supp. 396, D. Neb., 1972.)

b. When a teacher's private associations are a matter of public knowledge, the right of privacy does not prevent the school board from seeking sanctions if the associations are detrimental to the school.

(1) A teacher may be dismissed for open and avowed extramarital cohabitation with a member of the opposite sex in violation of community standards. (Sullivan v. Meade County School District, 387 F. Supp. 1237, D. So. Dak., 1975.)

(2) A teacher may have her teaching certificate revoked for active membership in a swingers club that promotes diverse sexual activity among its members in the semipublic atmosphere of a club party. (Pettit v. State Board of Education, 513 P. 2d 889, Cal.,1973.

4. Unions

   a. Membership

      Teachers have a constitutional right to form and join labor organizations as a part of the right of association.

   b. Non-membership

      (1) Teachers cannot be compelled to join an organization against their wishes.

      (2) In "agency-shop" states teachers may be required to pay a service fee equivalent to union dues.

         (a) Such funds may be used by the union only for collective bargaining, contract administration, and grievance adjustment.

         (b) These funds may not be used by the union for ideological, political purposes not related to collective bargaining. (Abood v. Detroit Board of Education, 431 U.S. 209, 1977.)

   c. Collective Bargaining

      (1) There is no constitutional requirement that school boards bargain with teacher organizations.

      (2) In those states having bargaining statutes, the state law is controlling.

      (3) In the absence of enabling legislation, courts disagree on the legality and enforceability of collective agreements.

      (4) Kentucky follows the common law view that school boards have no obligation to negotiate with their employees and that they retain exclusive control over teachers' working terms and conditions. (OAG 75-126.)

      (5) A local board of education has the discretion to bargain collectively with its classified employees. The recognition of groups of employees and the scope of bargaining is left to the board's discretion. (OAG 77-356.)

(6) A board has no duty to recognize, negotiate or bargain with a union, but it has the authority to do so. (Board of Trustees of the University of Kentucky v. Public Employees Council No. 51, 571 S.W. 2d 616, 1978.)

(7) A board cannot enter into an agreement with an exclusive bargaining agent, but for reasons of administrative efficiency may choose to negotiate with only one group (or more than one group or no group). (Fayette County Education Association v. Hardy, 626 S.W. 2d 217, 1980.)

(8) A board cannot agree to abide by an agreement before that agreement has been finalized. (Ibid.)

(9) A board can grant access to its intra-school mail facilities to the exclusive bargaining representative while barring use by a rival union. (Perry Education Association v. Perry Local Educators' Association, 460 U.S. 37, 1983.)

d. Strike

(1) There is no constitutional right to strike.

(2) Case law holds that teacher strikes are illegal in Kentucky. (Jefferson County Teachers Association v. Board of Education, 463 S.W. 2d 627, 1970.)

(3) Other techniques of work stoppages, such as sanctions and sick-outs, are unlawful when they obstruct normal functioning of the school.

5. Picketing

a. As picketing involves expressive conduct protected by the First Amendment, the Supreme Court ruled unconstitutional a city ordinance prohibiting all non-labor picketing near the schools while they are in session. (Police Department of the City of Chicago v. Mosely, 408 U.S. 92, 1972.)

b. An identical picketing ordinance was invalidated in a companion case, but the court upheld an anti-noise provision forbidding the willful making of noise that disturbs classes. (Grayned v. City of Rockford, 408 U.S. 104, 1972.)

II. Academic Freedom

A. Source and Extent

1. The concept of academic freedom developed as a higher education ideal.

2. Differences between higher education and public schools:

    a. University scholars stress independent research on the frontiers of knowledge.

    b. Public school teachers instruct children in a preset curriculum.

    c. College students are presumed to be mature individuals, able to distinguish fact from opinion, capable of facing controversial or conflicting views, and with values that need not be protected.

    d. School pupils are presumed to be children, often immature, unable to distinguish fact from opinion, and more susceptible to having their values undermined by conflicting views.

3. Nevertheless, academic freedom for public school teachers is a special subset of constitutionally protected speech.

4. The independence of the teacher must be balanced with the state's right to ensure teacher neutrality in instruction and to compel teacher observance of the official curriculum.

B. Religious Instruction

1. As stated above, it is unconstitutional to prescribe Bible reading and prayers as elements of the public school curriculum. The constitutional prohibition on establishment of religion outweighs any claim that teachers may have to conduct such exercises.

2. Teachers may not use the classroom to promote or attack any religion or to promote or attack nonreligion.

3. Teachers may provide objective teaching about religion, where such is included in the approved curriculum.

C. Controversial Subjects

1. The state can prohibit teaching of only that which is "manifestly inimical to the public welfare." (Pierce v. Society of Sisters, 268 U.S. 510, 1925.)

2. A state law which prohibits the teaching of modern foreign languages to children in kindergarten through the eighth grade is unconstitutional. (Meyer v. Nebraska, 26 U.S. 390, 1923.)

3. A state law prohibiting the teaching of evolution in the public schools is unconstitutional. (Epperson v. Arkansas, 393 U.S. 97, 1968.)

4. A state law requiring "balanced treatment" in the teaching of evolution and creationism is unconstitutional. (Edwards v. Aguillard, 55 L.W. 4860, 1987.)

5. Courses in family life and sex education may be taught, as long as parents have the right to have their children excused from the instruction. (Cornwell v. State Board of Education, 428 F. 2d 471, 4 Cir. 1970, Cert. den. 400 U.S. 942, 1970.)

6. A teacher is not likely to be upheld in referring to sexual matters before students in a manner that is irrelevant, oppressive, and degrading. (State v. Board of School Directors, 111 N.W. (2d) 198, 1961.)

7. All instructional material used in certain federally funded programs shall be available for inspection by parents of the pupils involved. (34CFR Subtitle A, Part 98.)

8. No student in such programs shall be required without prior consent to submit to psychiatric or psychological examination, testing, or treatment in which the primary purpose is to reveal certain personal information about the student or his family. (Ibid.)

D. Literary Censorship

1. The right of the tacher to teach "objectionable" literature is not ettled.

   a. A federal distict court in Maryland upheld the school board's refusal to renew the contract of a probationary tacher who had assigned Aldous Huxley's Brave New World to his class. (Parker v. Board of Education, 237 F. Supp. 222 D. Md. 1965.)

   b. A federal distict court in Alabama ordered the reinstatement of a teacher for assigning as outside reading in an English class a story "Welcome to the Monkey House," to which certain school system administrators objected because it allegedly condoned free sex and the killing off of elderly people. (Parducci v. Rutland, 316 F. Supp. 352, Ala. 1970.)

   c. In another case a teacher had illustrated the use of taboo words by discussing a vulgar term for sexual intercourse. The circuit court judges were not in agreement on whether this act was protected by the First Amendment, but held for the teacher on due process grounds. (Mailloux v. Kiley, 448 F. 2d 1242, 1st Cir. 1971.)

d. The Supreme Court of California held that a teacher could not be dismissed for reading in class a story containing language objected to by school authorities (Linfros v. Governing Board of Torrence Unified School District, 510 P. 2d 361, 1973, Cert. Den. 414 U.S. 1112, 1973.)

e. On the other hand, a federal court of appeals upheld the dismissal of a teacher for distributing a brochure referring to the pleasures of marijuana and encouraging children to free themselves from the moral environment of their homelife. (Brubaker v. Board of Education, 502 F. 2d 973, 7th Cir. 1974, Cert. Den. 421 U.S. 965, 1975.)

2. No general rule has been developed to obviate the necessity of a case-by-case inquiry into whether the legitimate interests of school authorities override the teacher's interest in academic freedom.

a. Teachers do not have a license to say or write in class whatever they choose.

b. Tenured teachers may be more secure than probationary teachers.

c. The right to teach, inquire, to evaluate and to study is fundamental to a democratic society.

d. The age and maturity of the students and the atmosphere in which the challenged act takes place will be considered by the courts.

e. Academic freedom is not an enumerated right of the first amendment, but some courts have referred to it as a First Amendment right.

f. The burden of proof that an assignment is inappropriate or that it is disruptive of the educational processes of the school is on school authorities.

3. The right to receive information and ideas is an inherent corollary of the rights of free speech and press that are explicitly guaranteed.

a. All First Amendment rights accorded to students and teachers must be construed in light of the special characteristics of the school environment, but the special characteristics of the school library make that environment especially appropriate for the recognition of First Amendment rights.

b. Local school boards may not remove books from school library shelves simply because they dislike the ideas contained in those books and seek by their removal to prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion. (Board of Education of Island Trees v. Pico 102 S.Ct. 2799, 1981.)

E. Copyrighted Material

1. The First Amendment does not give a teacher unlimited freedom to use materials developed and copyrighted by another person.

2. The courts balance the interests of copyright owners with the needs of others for access to the materials by a test of reasonableness known as the "Fair Use Test." The four criteria considered in this test are:

   a. The purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;

   b. the nature of the copyrighted work;

   c. the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and

   d. the effect of the use upon the potential market for or value of the copyrighted work.

3. Fair use exceptions for teachers are given in the Guidelines section of the Supplement to this Unit.

SUPPLEMENT TO UNIT FOUR

FREE SPEECH OUTSIDE THE CLASSROOM

Free speech outside the classroom may be restricted if:

________ there is a need for confidentiality

________ there is no factual basis for the assertions

________ there will be a harmful effect upon the community or educational process

________ there will be controversy and conflict in the community

________ statements are made recklessly with total disregard for the truth

________ statements damage the professional reputation of the parties involved

________ the working relationship with your school or administrator is impaired

________ statements cannot be proved or disproved

________ statements are knowingly false and misleading

________ the issue is not one of legitimate public concern

These are suggested guidelines, not infallible legal rules. For example, a teacher's speech may be constitutionally protected in some instances even though it violates the guidelines; e.g. a statement on a matter of public concern may be legally permissible even though it generates conflict and controversy in the community.

GUIDELINE QUESTIONS
REGARDING
ACTIONS OUTSIDE OF SCHOOLS

You should be able to answer NO to these questions:

Will the action have a negative effect on my ability to teach?

Are the actions likely to have a harmful effect on the educational process?

Will the action or indiscretion achieve public notoriety?

Will the action involve students in unacceptable or non-standard student-teacher relationships?

Will a political action carry into the classroom?

Will a political action interfere with my duties and responsibilities as a teacher?

Are my actions an attempt to further illegal aims of the organization in which I hold membership?

GUIDELINE QUESTIONS
FOR THE USE OF
CONTROVERSIAL MATERIALS AND TECHNIQUES

You should be able to answer YES to these questions:

_____ Is there a valid educational purpose in the use of this material?

_____ Is it in the lesson plan?

_____ Is it in the course of study?

_____ Is it relevant to the subject being taught?

_____ Is the material not barred by prior board action?

_____ Is it appropriate for the age and maturity level and general development of the students?

_____ Will the material or technique not be disruptive to school or classroom discussions?

_____ Will this have the support and acceptance of the preponderance of your profession?

_____ Will you be teaching the material in the subject area of your expertise?

_____ Will you give students an alternative assignment with controversial reading?

_____ Will students have the right not to listen? (captive audience idea)

_____ Are you presenting both sides of a controversial issue?

_____ Is your material well-researched and objective?

Note: There are no general standards by which to judge all cases involving freedom of expression. The courts have taken a case-by-case approach to academic freedom. Therefore, cautious planning is essential.

GUIDELINES FOR USE
OF
COPYRIGHTED MATERIALS

GUIDELINES

I. *Single Copying for Teachers*

A single copy may be made of any of the following by or for a teacher at his or her individual request for his or her scholarly research or use in teaching or preparation to teach a class:

A. A chapter from a book;

B. An article from a periodical or newspaper;

C. A short story, short essay or short poem, whether or not from a collective work;

D. A chart, graph, diagram, drawing, cartoon or picture from a book, periodical, or newspaper;

II. *Multiple Copies for Classroom Use*

Multiple copies (not to exceed in any event more than one copy per pupil in a course) may be made by or for the teacher giving the course for classroom use or discussion; *provided that:*

A. The copying meets the tests of brevity and spontaneity as defined below; *and,*

B. Meets the cumulative effect test as defined below; *and*

C. Each copy includes a notice of copyright.

Definitions

Brevity

(*i*) Poetry: (a) A complete poem if less than 250 words and if printed on not more than two pages or, (b) from a longer poem, an excerpt of not more than 250 words.

(*ii*) Prose: (a) Either a complete article, story or essay of less than 2,500 words, or (b) an excerpt from any prose work of not more than 1,000 words or 10% of the work, whichever is less, but in any event a minimum of 500 words.

[Each of the numerical limits stated in "i" and "ii" above may be expanded to permit the completion of an unfinished line of a poem or of an unfinished prose paragraph.]

(*iii*) Illustration: One chart, graph, diagram, drawing, cartoon or picture per book or per periodical issue.

(*iv*) "Special" works: Certain works in poetry, prose or in "poetic prose" which often combine language with illustrations and which are intended sometimes for children and at other times for a more general audience fall short of 2,500 words in their entirety. Paragraph "ii" above notwithstanding such "special works" may not be reproduced in their entirety; however, an excerpt comprising not more than two of the published pages of such special work and containing not more than 10% of the words found in the text thereof, may be reproduced.

Spontaneity

(*i*) The copying is at the instance and inspiration of the individual teacher, and

(*ii*) The inspiration and decision to use the work and the moment of its use for maximum teaching effectiveness are so close in time that it would be unreasonable to expect a timely reply to a request for permission.

Cumulative Effect

(*i*) The copying of the material is for only one course in the school in which the copies are made.

(*ii*) Not more than one short poem, article, story, essay or two excerpts may be copied from the same author, nor more than three from the same collective work or periodical volume during one class term.

(*iii*) There shall not be more than nine instances of such multiple copying for one course during one class term.

[The limitations stated in "ii" and "iii" above shall not apply to current news periodicals and newspapers and current news sections of other periodicals.]

III. *Prohibitions as to I and II Above*

Notwithstanding any of the above, the following shall be prohibited:

(A) Copying shall not be used to create or to replace or substitute for anthologies, compilations or collective works. Such replacement or substitution may occur whether copies of various works or excerpts therefrom are accumulated or reproduced and used separately.

(B) There shall be no copying of or from works intended to be "consumable" in the course of study or of teaching. These include workbooks, exercises, standardized tests and test booklets and answer sheets and like consumable material.

(C) Copying shall not:

(a) substitute for the purchase of books, publishers' reprints or periodicals;

(b) be directed by higher authority;

(c) be repeated with respect to the same item by the same teacher from term to term.

(D) No charge shall be made to the student beyond the actual cost of the photocopying.

Separate guidelines pertain to other kinds of materials, such as art, music, computer software, or television programs. Teachers wishing to copy such material should consult 17 U.S.C.A.

WERE THE CONSTITUTIONAL RIGHTS OF THESE TEACHERS VIOLATED?

1. Amburgey

Grace Amburgey was a non-tenured librarian at the Rowan County High School in Morehead, Kentucky. Soon after her employment in 1969, she became active in political opposition to the Superintendent and the Board. Nevertheless, the Superintendent recommended her reemployment for 1971-72 and the Board renewed her contract. During 1972 she discontinued her political opposition, but was involved in other incidents which led to a decision not to reemploy her.

On May 10, 1972, she received notice that she would not be recommended for reemployment. At her request specific reasons for her not being recommended were furnished by letter dated June 12, 1972.

ROWAN COUNTY BOARD OF EDUCATION
Clifford R. Cassady, Superintendent
118 University Boulevard
Morehead, Kentucky 40351
June 12, 1972

Mrs. Grace Amburgey
Alfrey Heights
Morehead, Kentucky 40351

Dear Mrs. Amburgey:

Pursuant to your request of May 22, 1972, for specific reasons for my recommendation not to reemploy you for the 1972-1973 school year, reference is made to my previous letter to you dated May 4, 1972, wherein stated reasons were given and which are now readopted and in addition thereto for the following reasons:

1. **Belittling instructions of the principal in the presence of the teaching staff.**
2. **Advising faculty members that principal had failed to give instructions on attendance of pep rally, which was false and erroneous.**
3. **Requesting at a staff meeting that you be given the right to criticise the principal over the intercom system to all classrooms.**
4. **Entering classroom of another teacher and creating embarrassment to the teacher before her students.**
5. **Questioning authority of the principal to remove aide from classroom and library, and behavior in an insubordinate manner to principal.**
6. **Making threat of physical harm to administration official before other school personnel.**

Very truly yours,

Clifford R. Cassady, Superintendent
Rowan County Board of Education

She admitted stated reasons (1), (3), (4), and (5), but claimed her actions were constitutionally covered by free speech. Evidence indicated that once she shoved the Superintendent and that on numerous occasions in the presence of other teachers stated that both the Principal and Superintendent were unfit for their positions in intemperate language, such as "the old son-of-a-bitch wasn't fittin' to be a superintendent;" "someone ought to kill him;" she "would lay a .38 between his eyes;" and the principal and the superintendent "ought to be shot." She said she meant no harm by such remarks; it was just her way of saying she disagreed with them. She claimed the real reason that she was not reemployed was her political opposition to the superintendent and school board.

How would the U.S. District Court respond to Mrs. Amburgey's claim that the stated reasons were pretexts beclouding constitutionally offensive actions of the superintendent and board? To what extent was the speech complained about constitutionally protected? Were her First Amendment rights violated? She also claimed violation of her 14th Amendment rights. On what basis? Was she justified in this claim?

2. Pickering

Marvin Pickering was a high school teacher in Joliet, Illinois. After a proposed tax increase had been defeated Pickering wrote a letter to the editor of the local newspaper in which he criticized the board of education allocation of funds between educational and athletic programs and both the board's and the superintendent's methods of informing the real reasons why a tax increase had been sought. Pickering overstated the amounts expended on athletics. (The amounts actually spent were a matter of public record.) In sum, Pickering made erroneous public statements upon issues then currently the subject of public attention, and these statements were critical of his employer. The letter was greeted by everyone but the board by massive apathy and total disbelief. The board fired him.

Did they violate his constitutional rights?

3. James

Charles James was a high school English teacher in Elmira, New York. When November 14 and December 12, 1969, were designated as "moratorium" days by opponents of the Vietnam War, the religious society to which James belonged determined to observe the two days by wearing black armbands. On November 14 James affixed an armband to the sleeve of his jacket. While James was teaching poetry to his second period class, apparently without any incident or discussion whatsoever relating to Vietnam or the armband, the principal summoned him to the office and requested him to remove it. When he refused to do so, he was ordered to remove the armband or risk suspension. He again refused, was suspended, and ordered to leave the school at once. The following day he received a letter from the board reinstating him on "the understanding that (he) engage in no political activities in the school. James resumed his teaching duties, but on December 12 he came to school wearing a black armband "as an expression of religious aversion to war and as a sign of regret over the loss of life in Vietnam."

There is no evidence that there were any incidents or threats to school discipline or that any students had complained of or were offended by the armband. The board of education discharged James.

Is wearing an armband protected by the First Amendment? Did the board violate his constitutional rights? James was a practicing Quaker; Quakers are doctrinally opposed to war. Did this make any difference? Suppose he had worn a political button saying "Elect John Doe to get us out of Vietnam"? Do you think the court would have ruled the same way? Suppose the wearing of the armband had caused disruption. Would that affect the court's decision?

4. Doyle

Fred Doyle was a nontenured teacher in the Mt. Healthy (Ohio) School District, who became involved in several controversial incidents. First he engaged in an argument with another teacher which culminated in the other teacher's slapping him. Doyle subsequently refused to accept an apology and insisted upon some punishment for the other teacher. His persistence in the matter resulted in the suspension of both teachers for one day, which was followed by a walkout by a number of other teachers, which in turn resulted in the lifting of the suspensions.

On other occasions, Doyle got into an argument with employees of the school cafeteria over the amount of spaghetti which had been served him; referred to students, in connection with a disciplinary complaint, as "sons of bitches"; and made an obscene gesture to two girls in connection with their failure to obey commands made in his capacity as cafeteria supervisor. Chronologically the last in the series of incidents which Doyle was involved in during his employment by the Board was a telephone call by him to a local radio station.

The principal circulated to various teachers a memorandum relating to teacher dress and appearance. Doyle's response to the receipt of the memorandum was to convey the substance of the memorandum to a disc jockey at WSAI, a Cincinnati radio station, who promptly announced the adoption of the dress code as a news item.

One month later the superintendent recommended that Doyle not be rehired. The recommendation was adopted by the Board. Shortly after being notified of this decision, Doyle requested a statement of reasons for the Board's actions. He received the following statement:

> You have shown a notable lack of tact in handling professional matters which leaves much doubt as to your sincerity in establishing good school relationships. You assumed the responsibility to notify W.S.A.I. Radio Station in regards to the suggestion of the Board of Education that teachers establish an appropriate dress code for professional people. This raised much concern not only within this community, but also in neighboring communities.
>
> You used obscene gestures to correct students in a situation in the cafeteria causing considerable concern among those students present.

Were Doyle's constitutional rights violated? Was his call to the radio station protected speech? Were the obscene gestures constitutionally protected? If the board cited one constitutionally protected right in its reasons for nonrenewal, must they reemploy him regardless of what else he did?

5. Brimley

Richard Brimley was an English teacher in East Hartford, Connecticut, who was reprimanded for failing to wear a necktie while teaching. He sued the board, claiming that the reprimand for violating the dress code violated his constitutional rights. He claimed that his refusal to wear a necktie communicated to his students that he "is not tied to establishment conformity" and indicated "his association with the ideas of the generation to which those students belong."

Is not wearing a necktie symbolic speech? Does it communicate a message? Is there a difference between this case and the one where a teacher wore a black armband? Did Mr. Brimley have a liberty interest in his choice of attire? If so, can the school board constitutionally interfere with that interest?

6. Russo

Susan Russo was a non-tenured art teacher in Henrietta, New York. Shortly after the beginning of the school year, a notice appeared on the school bulletin board announcing the pledge of allegiance would be recited each day and that all students and staff members were expected to salute the flag. The pledge was read over the intercommunication system during homeroom period. Students and teachers were to stand in their homeroom classes and recite the pledge along with the voice over the public address system. Mrs. Russo and a tenured teacher, Mrs. Adams, were assigned to supervise the same homeroom. Although Mrs. Adams saluted the flag and recited the pledge each morning, Mrs. Russo did not. She always stood and faced the flag, but never saluted nor recited the pledge. She never tried to influence the students to follow her example; all students recited the pledge each day under Mrs. Adams's guidance. It was not until April 19 that the principal became aware that Mrs. Russo was not reciting the pledge. The next day she was called to the principal's office and asked to explain her behavior. She stated her unwillingness to recite the pledge and salute the flag was a matter of personal conscience. On May 1 the principal visited Mrs. Russo's classroom during the homeroom period. When she still did not salute or pledge, he told her that he was going to recommend that her contract not be renewed. On June 23, the board terminated her contract. No reasons were given, but in the trial the principal testified that he would not recommend Mrs. Russo's contract be renewed because she had been insubordinate in refusing to follow a school regulation.

May a high school teacher be dismissed when the sole ground for that dismissal is the teacher's refusal to comply with a school regulation which required her to participate with her class in the pledge of allegiance? Mrs. Russo did not assert a religious objection to the pledge. Did she have a constitutional basis for her refusal? If so, what was it? Mrs. Russo's behavior had no disruptive effect on her classes. Would this fact influence the court's decision.

7. Cooley

J. F. Cooley was a tenured social studies teacher in Forrest City, Arkansas. He was also a minister and served as pastor of a church while he was a full-time teacher. Cooley was very active in various community organizations, was an influential civil rights proponent, and also served as a probation officer for the state circuit court. During the last two years of his 11-year stay in Forrest City, Cooley had continuous difficulty with the superintendent and the school board. One of the difficulties was his insistence on wearing his probation officer's badge while in his classroom, despite the superintendent's objections. Another cause of difficulty was Cooley's conducting meetings with outside adult citizens in his classroom during the school day, which the superintendent said interfered with his classroom teaching duties. Cooley continued to hold such meetings contrary to school regulations and in spite of repeated warnings from the superintendent. After being called to the superintendent's office a number of times. Cooley said: "I will not meet with you again on these matters unless my principal has been notified, and my accusers are present." Cooley was fired for insubordination.

Were his constitutional rights violated if his discharge was the result of his own public expression of his views and civil rights advocacy? Were his rights violated if his behavior disrupted the orderly operation of the school? Which constitutional provision could he use in his defense? Suppose the court held that his dismissal was for his failure to cooperate with the superintendent and to comply with established rules and regulations, could he then be fired?

8. Keefe

Robert Keefe was a tenured English teacher in the Ipswich (Mass.) Public School System. On the opening day of school he gave each member of his senior English class a copy of Atlantic Monthly and stated that the homework assignment was to read the first article therein. He discussed the article, especially a particular word used in it, explained the word's origin and context, and the reasons the author had included it. (The word, highly offensive, is a vulgar term for an incestuous son.) The author had used the word in connection with a slogan "Up against the wall," which was widely used by college radicals in the 1960s.) The next evening Keefe was called before the school board and asked to defend his use of the offending word. Following his explanation, the board asked him not to use it again. He said that he could not, in good conscience, agree. Soon thereafter he was suspended and the board scheduled a hearing to consider his discharge. Keefe sought to enjoin the hearing, as violating his civil rights. (The article was in no way obscene or pornographic, but was scholarly, thoughtful, and thought-provoking. The offensive word was used repeatedly, not to advocate incest, but as a superlative of opprobrium.)

What right did Keefe claim the board violated? May a teacher for demonstrated educational purposes, quote a "dirty" word that some students will find highly objectionable? Suppose Keefe had required a student to write the word 1000 times after he had overheard him say it? Suppose he had confiscated a note containing the word and read it aloud to the class?

9. Cooper

Janet Cooper was a non-tenured American history teacher in the Kingsville, Texas, School District. She used a technique known as "Sunshine simulation" to teach history of the post-Civil War Reconstruction period. The technique involved role-playing by students and evoked strong feelings on racial issues. Several parents complained, and the principal twice talked with her about the project. At the second meeting, the school district's personnel director was also present, and he told Cooper "not to discuss Blacks in American history" and that "nothing controversial should be discussed in the classroom." Despite the complaints, both the principal and the superintendent recommended that Cooper's contract be renewed. The Board disagreed and declined to renew her contract. Board members testified that they disapproved of the Sunshine project and that the volumes of complaints diminished Cooper's effectiveness as a teacher.

10. Renfroe

Cheryl Anne Renfroe was a non-tenured teacher in Piedmont City, Alabama. In responding to budgetary problems, the superintendent had offered Renfroe a job sharing a full-time position with another teacher. Renfroe expressed her unwillingness to job share at that time and subsequently filed a grievance asserting her interest in keeping a full-time job and claiming that she had seniority and more teaching experience than the other teacher. The other teacher was then hired on a full-time basis, and Renfroe was not rehired at all. She filed suit under 42 U.S.C.A.Sec. 1983, contending she was not rehired because she filed a grievance, and that this violated her First Amendment rights.

Were Renfroe's rights violated? Defend your answer, giving special attention to the nature of her grievance.

11. Littlejohn

Linda Littlejohn was a non-tenured teacher in the Calloway County (Ky) School System. In the 1980-81 and 1981-82 school years she was employed as a full-time fifth grade teacher. According to her principal, Bobby Allen, she was an excellent teacher. Because of the Kentucky law stating that non-tenured teachers are automatically rehired unless they receive written notice by April 30, Calloway County routinely gives such notice to all non-tenured teachers in April. During the summer, the superintendent recommends an appropriate number for reemployment. In April, 1982, Littlejohn received notice. Subsequently, she and her husband separated and were divorced in July. Meanwhile, the superintendent, Jack Rose, began making recommendations for reemployment of non-tenured teachers. Rose overruled Allen's recommendation that Littlejohn be rehired. When asked the reason Rose replied that he had received some phone calls, that people in the community were concerned about the divorce, and that the reemployment of Littlejohn would present a bad image of the school system.

Littlejohn sued Rose and the Board of Education, claiming that her constitutional rights of privacy and liberty were violated. Is there a constitutional right to privacy? What liberty interest, if any, of Littlejohn was involved? What relief could she seek?

UNIT FIVE

FIRST AMENDMENT RIGHTS OF STUDENTS

I. GENERAL PERSPECTIVE

A. Coverage

1. Children are persons under the Constitution and thus have First Amendment and other constitutional rights. (In re Gault, 387 U.S. 1, 1967.)

2. The First Amendment applies to children in their relations to public schools but not to their relations with parents or nonpublic schools.

B. Moshman's Six Principles*

1. Free Expression. Government may not prevent children from expressing any idea unless the abridgment of expression serves a compelling purpose that cannot be served in a less restrictive way.

2. Freedom of Nonexpression. Government may not require children to express a belief in any idea.

3. Limited Inculcation.

   a. Government may instill ideas only when it has a legitimate purpose for doing so (e.g., to produce educated citizens).

   b. Inculcation may not have the advancement or hindrance of any religion or of religion in general as its purpose or principal effect.

   c. Government may not indoctrinate children--that is, impose ideas in a way that unnecessarily limits the possibility of critical or rational analysis.

4. Freedom of Access. Government may not restrict a child's access to ideas or sources of information unless the restriction serves a compelling purpose that cannot be served in a less restrictive way.

5. Free Exercise of Religion. Government may not restrict children from acting in accord with their religious beliefs unless the restriction serves a compelling purpose (e.g., to prevent disruption of education or perceived establishment of religion in a public school) that cannot be served in a less restrictive way.

6. Nonarbitrary Distinction of Child from Adults. Government may restrict children's First Amendment rights on the basis of children's characteristics (e.g., limited intellectual competence) if and only if:

   a. children of the age in question differ in relevant respects from minimally normal adults;

   b. the difference is of such a nature and extent that substantial harm is likely unless First Amendment freedoms are abridged;

   c. the potential harm outweighs First Amendment interests.

*These principles are not a summary of the law, but Moshman's view of how the First Amendment should be interpreted with respect to children. David Moshman, Children's First Amendment Rights: Legal and Empirical Issues. Presented at the meeting of the Society for Research in Child Development, Baltimore, April 1987.

II. Freedom of Expression

A. Speech

1. Pupils cannot be punished merely for the expression of ideas that are unconventional or unpopular.

2. The school classroom is not a public forum. Therefore, a pupil's speech in the classroom may be restricted to matters that are appropriate to the concerns of the class. Outside the classroom such restrictions do not apply.

3. Profane, vulgar, abusive, and other inappropriate language may be prohibited in the school setting. (Bethel v. Fraser, 106 S.Ct. 3159, 1986.)

4. A Kentucky law that made it a crime for anyone to abuse verbally a teacher was held unconstitutional. (Commonwealth v. Ashcraft, 691 S.W. 2d 229, 1985.)

B. Symbolic Expression

1. The most important Supreme Court decision on student expression was Tinker v. Des Moines Independent Community School District (393 U.S. 503, 1969.) In this landmark case the Court issued a number of guidelines:

   a. Neither students nor teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.

   b. Wearing of a symbol which communicates an idea is "speech" as contemplated by the First Amendment.

   c. Speech which can reasonably be forecast to interfere materially and substantially with the requirements of appropriate discipline in the school can be prohibited.

   d. Undifferentiated fear or apprehension of disturbance is not enough to overcome the right of freedom of expression.

   e. In order for school officials to justify prohibition of a particular expression of opinion, they must be able to show that their action was caused by more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint.

2. An exercise in applying these guidelines to the facts of the case is provided in the Supplement to this Unit.

3. A series of cases on wearing political buttons and other symbols has provided further clarification of this area.

   a. A school regulation prohibiting pupils from wearing buttons containing the words "One Man, One Vote" was held unconstitutional by the Fifth Circuit Court of Appeals. (Burnside v. Byars, 363 F. 2d 744, 5th Cir. 1966.)

   b. On the same day the same court upheld the suspension of students in another Mississippi school for disrupting the school by distributing buttons in the corridors of the school and pinning buttons on other students, including students who did not want them. (Blackwell v. Issaquena County Board of Education, 363 F. 2d 749, 5th Cir. 1966.)

   c. The Sixth Circuit Court of Appeals upheld an Ohio school principal's action in suspending a pupil for violating the school's long-standing no-button rule. The Court considered both the long-term, uniform enforcement of the rule and the danger of disruption if it were revoked during a time of racial tension in the school. (Guzick v. Drebus, 431 F. 2d 594, 6th Cir. 1970.)

d. The Sixth Circuit also upheld the suspension of a student for refusal to stop wearing a Confederate sleeve patch on his jacket. The student attended a Tennessee high school that had been closed twice from disruptions related to a tense racial situation. (Melton v. Young, 465 F. 2d 1332, 6th Cir. 1972.)

e. The Seventh Circuit Court of Appeals upheld the right of the student body of an Indiana high school to adopt school symbols that were offensive to black students. The judges felt that the matter called for educational leadership rather than judicial intervention. (Banks v. Muncie Community Schools, 433 F. 2d 292, 7th Cir. 1970.)

f. On learning of a plan by students in a Texas high school to wear black armbands, school officials banned the wearing of all armbands for fear that other students might try to tear the armbands off the students who wore them. The Fifth Circuit Court of Appeals ruled the ban was unconstitutional. (Butts v. Dallas Independent School District, 436 F. 2d 728, 5th Cir. 1971.)

g. In another Texas high school, students of Mexican descent were suspended for wearing brown armbands as a symbol of their dissatisfaction with certain educational practices of their school district. The trial court held the armbands were protected by the First Amendment. (Aguirre v. Tahoka Independent School District, 311 F. Supp. 664, N.D. Tex. 1970.)

C. Press

1. Student publications are protected by the First Amendment, but the protection varies somewhat according to sponsorship, authorship, place of publication, and method of distribution.

2. Educators have authority over school-sponsored publications, theatrical productions, and other expressive activities that might be perceived to bear the imprimatur of the school. These activities are part of the curriculum, whether or not they occur in a classroom setting, so long as they are supervised by faculty members and designed to impart particular knowledge or skills to student participants and audiences. (Hazlewood School District v. Kuhlmeier, 56 U.S.L.W. 3041, 1988.)

3. School authorities may control the time, place, and manner or distribution of publications in order to maintain an orderly atmosphere on and around the school building.

4. Among the principles applied to student freedom of expression by circuit courts are these:

   a. Expression by high school students can be prohibited if it materially and substantially interferes with school activities.

   b. Expression cannot be prohibited solely because other students, teachers, administrators or parents may disagree with its content.

   c. Student publications may be prohibited from printing obscenities, but not from using language which is profane or vulgar (note the difference between printed materials and classroom speech).

   d. Expression by students may be subjected to prior censorship under clear and reasonable regulations. Such prior restraints are valid only if:

      (1) Schools issue clear and narrowly drawn regulations in advance to notify students of what is required and specify to whom and how the material is to be submitted for review.

      (2) School procedures ensure prompt decisions by school authorities on materials submitted.

      (3) Timely and fair hearings and a prompt appeal to higher authority are ensured.

      (4) The purpose of the restraints is to maintain school order, not to censor ideas.

III. OTHER

A. Academic Freedom of Students

1. The right to receive information and ideas is an inherent corollary of the rights of free speech and press that are explicitly guaranteed by the Constitution.

2. All First Amendment rights accorded to students must be construed in light of the school environment, but the special characteristics of the school library make it especially appropriate for the recognition of these rights. (Board of Education, Island Trees Union Free District v. Pico, 102 S. Ct. 2799, 1982.)

3. Students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding. (Kejishian v. Board of Regents, 385 U.S. 589, 1967.)

4. In view of public high school students' First Amendment right to know, students can bring suit in federal court to challenge actions of school boards in removing books from the public school library. (Minarcini v. Strongsville City School District, 541 F. 2d 577, 6th Cir. 1976.)

B. Personal Appearance (Is a person's hair style, choice of clothing, or other preference in personal appearance a form of expression protected by the First Amendment?)

1. The Supreme Court has not accepted any personal appearance cases. The Circuit Courts of Appeals are divided, some holding that these matters are of no constitutional concern, others suggesting that while a constitutional right may be involved the concern is too trivial for federal court intervention, and others stating that students do have a constitutionally protected right of expression in these matters.

2. The Sixth Circuit Court of Appeals has not found sufficient constitutional interests involved to overturn school regulations.

    a. The Sixth Circuit Court upheld suspension of students violating a regulation prohibiting the wearing of excessively long hair. (Jackson v. Dorrier, 424 F. 2d 213, 6th Cir. 1970.)

    b. The high court of Kentucky held that girls could be prohibited from wearing jeans to school. (Dunkerson v. Russell, 502 SW 2d 64, 1973.)

C. Freedom of Association

1. The implied right of association has grown out of First Amendment rights of assembly and petition, supplemented by due process concepts.

2. Students have a constitutional right of association to form and join lawful groups outside of school.

3. In school the public interest of promoting equality and nondiscrimination has been held to outweigh the student interest in joining fraternities, sororities, and other divisive or separatist clubs that engender an undemocratic spirit in the pupils.

4. Secret societies have been held to have a detrimental influence on the schools by tending to destroy good order, discipline, and scholarship. They are viewed as anti-democratic in their exclusiveness and out of place in a public school open to all on equal terms. (Robinson v. Sacramento City Unified School District, 53 Cal. Rptr. 781, 1966.)

5. If a school provides a forum for outside speakers, student groups have the right to invite controversial speakers. Equal time must be given to opposing views.

6. First Amendment right of access to school facilities depends upon nature of facilities.

    a. If property is traditional or designated public forum, parties seeking access can be excluded on basis of subject matter of speech only when necessary to serve a compelling state interest.

    b. If property sought to be used is not a public forum, control over access can be based on reasonable distinctions. (Student Coalition for Peace v. Lower Merion School District, 776 F. 2d 431, 3 Cir. 1985.)

7. Students have a First Amendment right not to associate. They may not be forced to support political causes and speakers they oppose.

8. The need for school information (such as disclosure of by-laws and organizations' officers) to supervise school-related activities can outweigh student claims of associational privacy.

SUPPLEMENT TO UNIT FIVE

TEST YOURSELF

1. Does freedom of speech apply to students in the classroom?
2. Does it apply in the cafeteria and on the playground?
3. Must school officials wait until a disruption actually occurs before restricting student expression?
4. Are fighting words protected?
5. Can school officials punish lewd and offensive speech?
6. Can states make it a crime for students to insult teachers?
7. Do students have a right to remain silent?
8. Do students have a right to academic freedom?
9. Can schools remove controversial books from a school library?
10. Can administrators cancel a school play because of its theme?
11. Can an "underground" newspaper be banned for discussing controversial topics?
12. Can a student newspaper be prohibited from criticizing school officials?
13. Can a student newspaper be prohibited from criticizing school policies?
14. Do schools have any control over the distribution of student publications?
15. Can schools ever restrict the content of student publications?
16. Is a publication obscene if it contains offensive, vulgar, or "dirty" language?
17. Can students be required to submit publications to the administration for review before distribution?
18. Can administrators ban articles on sensitive topics in school-sponsored newspapers?

19. Can student newspapers be prohibited from publishing surveys that could cause emotional harm to readers?

20. Can school newspapers prohibit political ads?

21. Can administrators ban the distribution of newspapers that contain ads for drug paraphernalia?

22. Can a school stop funding a student newspaper because of its editorial policy?

23. Can schools censor newspapers published by a journalism class?

24. Can schools regulate off-campus publications by students?

25. Does the First Amendment apply to high school yearbooks?

Answers

Yes - 1, 2, 5, 7, 14, 15, 17, 19, 21, 25

No - 3, 4, 6, 8, 10, 11, 12, 13, 16, 18, 20, 22, 23, 24

It depends upon circumstances of the particular case - 9, 18, 23

All of these questions and answers should be viewed with caution. Although they are based on actual court decisions, it is an oversimplification to reduce a complex court case to a one-sentence question and a "yes" or "no" answer.

For a fuller discussion of these questions, see Louis Fischer, David Schimmel, and Cynthia Kelly, Teachers and the Law, New York: Longman, 1987, 128-145.

CASES

STUDENT SPEECH AND THE SCHOOLS

In the interpretation of the First Amendment in student speech and expression cases, courts often use a sort of "balancing test." That is, freedom of speech is a very important right which must often be balanced against other values and rights in a particular situation. The judges will look at a number of variables before deciding which right is the most important in that instance and should, therefore, be given constitutional protection. Key factors that might be considered include time, place, and manner of the communication. Other factors might include prior history of events at that school, the subject of the speech, the number of demonstrators and/or observers, the composition of the crowd, the noise level, and the speaker himself.

For each case below, weigh the arguments for each side. Use the factors above to "tip the balancing scales" and decide which side has priority in each case.

1. John F. Tinker, 15, and Christopher Eckhardt, 16, were high school students in Des Moines, Iowa. Mary Beth Tinker, John's sister, was thirteen years old and attended junior high school. John and his family and friends were disturbed by American involvement in the Vietnam War. In December, 1965, a Christmas truce was announced, and many wanted to see this truce continued beyond the holiday season. A group of adults and teenagers who had been active participants in previous anti-war protests met at the home of the Eckhardts, to discuss ways of publicizing their support for the truce and their grief at the lives lost in Vietnam. They decided to wear black armbands over the holiday season, and fast on two days, December 16 and New Year's Eve.

   Meanwhile, the principals of the Des Moines schools heard about the plan to wear armbands. On December 14, 1965, the principals met and adopted a policy that any student wearing an armband would be asked to remove it, and if he or she refused, suspension would be the penalty until he or she returned to school without it. The students were aware of the policy the school authorities had adopted.

   On December 16, Mary Beth and Christopher wore black armbands to their schools. John Tinker wore his armband the next day. They were all sent home and suspended until they would come back without their armbands. They did not return to school until after the planned period for wearing armbands had expired - that is, after New Year's Day.

A complaint was filed in the U.S. District Court by the students through their fathers. They sought an injunction prohibiting the school board from carrying out the suspensions. An evidentiary hearing in District Court revealed that only a few of the 18,000 students in the Des Moines school system had worn the black armbands, and only five were suspended for wearing them. There was no indication that the work of the schools or any class was disrupted. Outside the classrooms, a few students made hostile remarks to the children wearing armbands, but there were no threats or acts of violence on school premises. The record showed that students in some of the schools wore buttons relating to national political campaigns, and some even wore the Iron Cross, traditionally a symbol of Nazism. School authorities did not purport to prohibit the wearing of all symbols of political or controversial significance.

After the hearing the District Court dismissed the complaint. The Eighth Circuit Court of Appeals affirmed, and then the Supreme Court agreed to hear the case on final appeal.

TINKER	DES MOINES SCHOOLS
1.____________________	1.____________________
2.____________________	2.____________________
3.____________________	3.____________________

2. Thomas Guzick, 17, a junior at Shaw High School in East Cleveland, Ohio, wore a political button to school advertising an anti-war rally. The school principal, Mr. Drebus, ordered Tom to remove the button. When Tom refused he was suspended until he would return to school without the button. After he was suspended, Tom went to court to seek legal determination whether he was entitled to wear this button at Shaw High.

   For many years Shaw High has had an informal rule prohibiting the wearing of buttons, emblems, or other insignia on school property during school hours unless these emblems are related to a school activity. The rule had never been published; nevertheless, it had been applied uniformly and consistently in a wide variety of situations for at least forty years at Shaw High. In the 1940s the rule was applied against fraternities and sororities at Shaw. Recently the problem of emblems again existed because of the racial mixture at Shaw.

Approximately 70% of the students at Shaw High were black, and 30% white. There had been considerable friction between the students of the two races and also among students of the same race. Although there had not been any serious racial disturbances, the school had serious discipline problems. Students had been threatened in the rest rooms. The threats were often accompanied by violence. Money had been extorted from students under these circumstances. There had been numerous fights. Tension at the time Tom wore his button to school was very high. Just two months earlier, black students had attempted a walkout, and Shaw officials were forced to call the police to the school.

GUZICK	DREBUS
1.________________	1.________________
2.________________	2.________________
3.________________	3.________________

3. On December 14, 1970, at Abington High School in Pennsylvania students organized a sit-in in the hallways during and after school. The sit-in continued the next day, until the students were cleared from the halls because of a court order. On that same day, December 15, the students were suspended from school for what the officials called "an activity disruptive to the normal operation of the school." The students had been noisy, they had skipped classes, and their presence in the hallways had caused other classes to be moved. In addition, as the demonstration went on, the student protesters became louder, and the crowds also became noisier and larger. The students took their case to court, claiming that their rights under the First Amendment had been violated by their suspensions.

STUDENTS	SCHOOL OFFICIALS
1.________________	1.________________
2.________________	2.________________
3.________________	3.________________

4. A group of Mexican-American parents were dissatisfied with the Tahoka Independent School District where their children attended school. They held several meetings and tried to improve the situation by sending letters. Students who were

supporting their parents in this effort decided to wear brown armbands to school. The school board then passed a policy prohibiting "disruptive, distracting" apparel that would "incite students of other ethnic groups." Some of the students wearing brown armbands were suspended. They sued the school authorities to stop their enforcement of this rule.

STUDENTS	TAHOKA SCHOOL DIST.
1.__________________	1.__________________
2.__________________	2.__________________
3.__________________	3.__________________

5. In April, 1983 at a high school student-run assembly, Matthew Fraser made a speech nominating a friend for a student office. In his speech, Fraser said, "I know a man who is firm--he's firm in his pants, he's firm in his shirt, his character is firm--but most of all, his belief in you, the students of Bethel, is firm.

   Jeff Kuhlman is a man who takes his point and pounds it in...He doesn't attack things in spurts--he drives hard, pushing and pushing until finally--he succeeds. Jeff is a man who will go to the very end—even the climax--for each and every one of you."

   Fraser was suspended for violating the school's disruptive conduct rule, which says the school can discipline students who use obscene or profane language or gestures. His name was also removed from a previously approved list of candidates on the ballot for graduation speaker.

   Fraser and his father filed suit, claiming the school violated Fraser's constitutional rights. The district court held for Fraser, and the school district appealed the decision to the Ninth U.S. Circuit Court of Appeals. Eventually the case reached the Supreme Court of the United States.

FRASER	BETHEL SCHOOL DIST.
1.__________________	1.__________________
2.__________________	2.__________________
3.__________________	3.__________________

STUDENT PRESS

Apply the Tinker Standard and any other tests you think appropriate to use (see Student Speech above) to decide the following cases involving student publications.

1. Raymond Scoville and Arthur Breen were the student editors of their Joliet Center High School paper, "Grass High." The January 15, 1968, issue of their publication contained fourteen pages of poetry, essays, record and movie reviews and an editorial critical of a report on the school the principal, Mr. David Ross, had recently sent home to parents. The two boys criticized just about everything the report said. For example:

   "...Ross states why the pamphlet was put out and the purpose it is supposed to accomplish, namely, the improvement of communication between parents and administration. He has to be kidding. Surely he realizes that a great majority of these pamphlets get thrown away by the students and in this case that is how it should have been. I urge all students in the future to either refuse to accept or destroy upon acceptance all propaganda that Central's administration publishes...Our senior dean seems to feel that the only duty of a dean or parent is to be the administrator of some kind of punishment...This is the product of a sick mind. Our senior dean because of his position of authority over a large group of young adults poses a threat to our community..."

   Three days after the sale of this issue of "Grass High" (sixty copies of which were sold), the dean advised Scoville and Breen that they could not take their first semester examinations. Four days later they were suspended for five days. Scoville was also removed as editor of the paper, and he and Breen were forbidden to participate in school debating activities. Later the dean sent a report to the superintendent recommending that the boys be expelled for the rest of the semester. The Superintendent presented this to the board. Scoville's mother had sent a letter saying how sorry the boys were for the trouble they had caused, but neither of the boy's parents attended the board meeting. The boys were expelled for the rest of the second semester. A lawsuit was brought in District Court after the Board's action. The Court upheld the Board, and the case was appealed to the Seventh Circuit Court of Appeals.

2. A school newspaper, The Farm News, published in the Hayfield Secondary School, is supported in part by the Fairfax County (Virginia) School Board, revenues from advertising, and sales of individual issued and student subscriptions. The Farm News is a student activity. Some of the students are enrolled in Journalism class and receive academic credit for their work on the paper, while others work on the paper as an extra-curricular activity. The paper is written at school during school hours and also at the homes of the participants. Copies of the newspaper are distributed to student subscribers in homerooms.

   The school board had recently banned teaching about birth control from the curriculum until a decision could be reached on a proposed program of instruction. Shortly after this time, The Farm News prepared for publication an article entitled, "Sexually Active Students Fail to Use Contraception." Because of a prior agreement the newspaper had with the administration that potentially controversial material would be submitted for review, the article was submitted to the principal, Doris Torrice. The principal decided that a certain portion of the article with information about contraceptives went against the school board's recent policy. The students were given the option of publishing the article with the offending passages deleted. However, the students chose to insist that the entire article be published or none of it. The principal's decision was upheld by the county's Advisory Board on Student Expression and then also by the Superintendent and School Board.

3. Spectrum was the school-sponsored newspaper at Hazelwood East High School in Missouri. It was published six times per semester and included stories of interest to students, written by students in the Journalism II class. The paper was sold during lunch periods for 25 cents per copy in the high school "commons" area. The newspaper staff was restricted to students in Journalism II and most of the work on the paper was done in class. Students could get a pass to leave class to do research and investigation, and they did some work outside of class just as they did homework for other classes. Spectrum was an integral part of the Journalism II class and not akin to an extracurricular activity such as student council, sports, or cheerleading.

   The Journalism teacher was in charge of the paper. He was the final authority with respect to almost every aspect of the production and publication of Spectrum, including its content. Board policy required that a copy of each issue be submitted to the high school principal before sending it to the printer. The board policy was quite specific in regard to guidelines for submission and evaluation of materials.

The principal deleted two articles from the May 13, 1983, issue of Spectrum without consulting the teacher or students. One article consisted of the personal accounts of three Hazelwood East girls who were pregnant. Each girl discussed her reaction to becoming pregnant, her plans for the future, her relationship with her father, the reactions of her parents, and details about her sex life and use or non-use of birth control methods. Although fictitious names were used the principal thought the girls might be identified. (There were about 8 or 10 pregnant girls in school at that time.) The other article the principal deleted dealt with the frequency and causes of divorce, as well as the effect of divorce on children. It included quotes from students (not identified by name), giving their perceptions of why their parents got divorced. The principal thought the stories constituted an invasion of privacy in that the parents of the students involved did not give their consent to the article nor were they provided an opportunity to present their side of the story.

The students claimed that the newspaper was a public forum for free expression and brought suit, charging their First Amendment rights were violated.

UNIT SIX

SEARCH AND SEIZURE

I. FOURTH AMENDMENT

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized."

A. Purpose

1. The purpose of the Fourth Amendment is to protect the public from invasion of their privacy by government. Until recently courts were divided on whether school officials were private persons or governmental agents. In 1985 the Supreme Court ruled that for Fourth Amendment purposes school principals act as representatives of the government. (New Jersey v. T.L.O. 105 S.Ct. 733, 1985.)

2. The prohibition is not against all searches, but against searches which are unreasonable.

3. Reasonableness is determined by the expectation of privacy, need for the search, and possible consequences of the search. As the need goes up and the expectation of privacy and possibility of negative consequences go down, the more reasonable the search becomes.

B. Warrantless Searches

Not all searches require a warrant, especially when there is not time to obtain one. Among permissible warrantless searches are:

1. Police searches of students incident to a lawful arrest,

2. seizures of contraband material that is in plain view of the authorities,

3. emergency searches to preserve school property or personal safety,

4. a search to prevent destruction of evidence,

5. a search of the premises if in "hot pursuit" (the police chase a suspect into a building.),

6. an inventory search while the item is in lawful custody, and

7. voluntary waiver of rights based on informed consent.

II. TEACHERS

A. Search and seizure is much more of a problem for pupils than for teachers.

B. Very few cases involving search of public school teachers have been adjudicated. (See related case, p. 119.)

1. A federal circuit court in Philadelphia held that an after school search of a counsellor's desk by a school board member was unlawful. (Gillard v. Schmidt, 579 F. 2d 825, 3d Cir. 1978.)

2. A California state court held that illegally seized evidence could be used in a school disciplinary proceeding against a teacher, even though such evidence would have been inadmissible in a criminal trial. (Mountainview School Dist. v. Metcalf, 36 Cal. App. 3d 551, 1974.)

III. STUDENTS

A. Locker Search

1. The fact that a locker is school property does not exempt it from Fourth Amendment protection.

2. A student's expectation of privacy in a locker may be extremely low, however. If information is clearly communicated to students that the school principal has a master key or the combination to their locks and that he retains the right to conduct routine searches of all lockers for contraband or emergency searches during bomb threats, virtually no expectation of privacy versus school officials exists. In such cases locker searches may be conducted with no particularized suspicion, provided proper safeguards are followed.

3. Search of a particular locker requires reasonable suspicion that contraband, disruptive to the educational process or possibly harmful, will be found. (Zamora v. Pomeroy, 639 F. 2d 663, 10th Cir. 1981.) The following grounds for reasonable suspicion have been held to justify a search:

   a. information from student informers,

   b. police tips,

   c. anonymous callers,

   d. unusual conduct by the searched student (secretive movements),

   e. fleeing an instructor when called

   f. tips from outside callers and personnel

4. Normally a student should be present during a search of his locker, stand beside the locker, and open it for the administrator. Another adult witness should be present. (These are "shoulds", not "musts." They do not apply in emergencies.)

5. Whenever possession of drugs or a weapon is suspected, most authorities recommend that the police should be notified. However, this creates problems:

   a. Police cannot search without a warrant.

   b. If school officials search the locker in the presence of police the "exclusionary" rule may apply. (Evidence so gathered may not be used in criminal proceedings against the students.)

   c. Some courts have held that the school principal has the power to consent to a search by police. (People v. Overton, 293 N.E. 2d 366, 1969; Stein v. State, 456 P. 2d, 1969.)

B. Search of Personal Property

1. A student has a higher expectation of privacy in his personal property than in his locker. He may waive his expectation of not having his automobile searched as a condition of securing a permit to park the car on school property. Otherwise, he has an expectation that his automobile, his duffle bag, purse, clothing and other belongings will not be searched.

2. Reasonable suspicion is required in order to search a student's personal property. (New Jersey v. T.L.O., 105 S.Ct. 733, 1985.)

3. The more personal the property, the higher the degree of suspicion required to make the search reasonable. Thus, the level of suspicion sufficient to search the pockets of an overcoat might not be enough to permit search of a student's underclothing. (Doe v. Renfroe, 631 F.2d 91, 7th Cir., 1980.)

C. Body Searches

1. A student has a high expectation of privacy that he will not be subjected to a body search.

2. Most courts hold that reasonable suspicion is insufficient to permit school officials to require a student to strip nude or to partially disrobe for a body search. A higher standard - probable cause (reasonable grounds of suspicion, supported by sufficient evidence to warrant a cautious person to believe that the individual is guilty of the offense charged) -is required. Regardless of whether probable cause exists, the offense must be grave to justify a strip search. (Bellnier v. Lund, 483 F. Supp. 47, N.D.N.Y. 1977.) Unless an emergency exists school officials should not conduct an involuntary strip search. Based upon probable cause, police officers can obtain a search warrant and conduct a search, if such a search is needed.

D. Canine Searches

1. Courts are divided on the legality of school officials using dogs to sniff students.

   a. The Seventh Circuit Court of Appeals ruled the sniffing of students was not a search. (Doe v. Renfroe, supra.)

   b. The Fifth Circuit Court of Appeals held that using dogs to sniff students was indeed a search. (Horton v. Goosecreek Independent School District, 690 F.2d 470, 5th Cir. 1982.)

2. The use of dogs to sniff objects, such as lockers or cars, which occupy a public space is not a search. A "public smell" is analogous to seeing something in "plain view." (Ibid.)

3. A dog alert is not sufficient basis to warrant a strip search. (Doe v. Renfroe, supra.)

IV. DRUG TESTING

A. Teachers

1. The Fourth Amendment applies to searches by public school officials. (New Jersey v. T.L.O., *supra*.)

2. The government-ordered extraction of body fluids (such as urine) is a search subject to the strictures of the Fourth Amendment. (Allen v. City of Marietta, 601 F. Supp. 482, N.D. Ga. 1985.)

3. Random drug testing of non-tenured teachers is unconstitutional. (Patchoque-Medford Congress of Teachers v. Board of Education, N.Y. App. Div., 2d Depart., August 11, 1986.)

4. Drug testing based on reasonable suspicion may be constitutional.

5. Drug testing based on probable cause definitely is constitutional.

6. The Board of Directors of the National Education Association adopted the following position statement in June, 1986:

> NEA is alarmed by the increased use of blood and urine tests by employers to determine if employees or job applicants have used alcohol or drugs. Current data indicates that these tests often produce erroneous results and do not reliably indicate whether or not a person's ability to perform his or her job is impaired. NEA believes that mandatory drug and alcohol testing of employees and job applicants is an unwarranted and unconstitutional invasion of privacy, and opposes such testing by school districts, colleges and universities.

7. The following objections have been raised to drug testing by school districts:

   a. Random drug testing violates the Fourth Amendment.

   b. Drug tests are so inaccurate that an employment decision based on an unconfirmed screening test is a violation of due process.

   c. Drug testing is a mandatory subject of bargaining and may not be implemented unilaterally by the employer.

d. Drug tests are racially discriminatory. (Melanin may cause a false positive for marijuana.)

e. To justify employee's termination, employers must prove current job impairment, not mere off-duty drug use.

f. Drug testing may violate state law or local ordinance.

g. Employer reliance on test results may lead to significant tort liability.

h. Mandatory drug testing may violate the Fifth Amendment's provision against self-incrimination. (Richard D. Simpson, "Seven Legal Arguments Why School Districts Should 'Just Say No' to Drug Testing." Paper presented to National Organization on Legal Problems of Education, Las Vegas, November 21, 1986.)

B. Other Employees

1. "The determination of the standard of reasonableness governing any specific class of searches requires 'balancing the need to search against the invasion which the search entails.'" (New Jersey v. T.L.O., supra at 741, citing Camara v. Municipal Court, 387 U.S. 523, 536-37, 1967.)

2. Because of the danger to public safety caused by driving while under the influence, there may be a need to subject school bus drivers to drug testing.

3. A policy which permitted drug testing of bus drivers after an accident or if "suspected of being under the influence" by two supervisors was upheld. (Division 241 Amalgamated Transit Union v. Suscy, 538 F. 2d 1264, 7th Cir. 1976.)

4. A policy which requires public bus and subway operators to undergo drug tests after any serious accident or when they return to work from any period of sick leave was upheld. (Sanders v. Washington Metropolitan Area Transit Authority, No. 84-3072, D.D.C. January 9, 1986.)

5. School bus attendants, however, are not in a position to endanger public safety, so random drug testing of such employees is unconstitutional. (Jones v. McKenzie, 625 F. Supp. 1500, D.D.C. 1986.) On appeal the Supreme Court ordered this decision reconsidered in light of its March 1989 decisions upholding drug testing of Customs Service and railway employees.

6. Random drug testing could be upheld in the case of school bus drivers or mechanics. (Dicta in Jones v. McKenzie, supra.)

C. Students

1. Drug testing of students by public school officials is a search governed by Fourth Amendment provisions.

2. Random drug testing of students is unconstitutional. (Odenheim v. Carlstaat-East Rutherford School District 510A. 2d 709, 1985, and Anable v. Ford, 653 F. Supp. 22, W.D. Ark., 1985.)

D. Athletes

1. Because participation in extra-curricular activities is sometimes viewed as a privilege rather than a right, a different standard may apply to testing for drug use students who wish to participate in interscholastic athletics.

2. The drug testing policy of the National Collegiate Athletic Association (NCAA) has been ruled unconstitutional. (LeVant v. NCAA, No. 87-CV-619209, Sup. Ct., Calif, Santa Clara County, March, 1987.) However, it was upheld in another case. (O'Halloran v. University of Washington, 679 F. Supp. 997, W.D. Wash, 1988.)

3. Drug testing of high school athletes was upheld in one case. (Schall v. Tippecanoe Co. School Corp., 679 F. Supp. 833, N.D. Ind. 1988.)

E. Status of Drug Testing in 1989

Several of the drug cases cited above were still under consideration or on appeal as of August, 1989. The legality of drug testing has not yet been settled.

V. Related Case

State government employees have a reasonable expectation of privacy in desk and file cabinets in private offices at their workplaces; search of government employee's desk and file cabinets made without warrant or probable cause by government employer either for noninvestigatory, work-related purposes or to investigate work-related misconduct, is reasonable under Fourth Amendment if it is justified at its inception by work-related need or reasonable suspicion and is reasonable in scope. (O'Connor v. Ortega, 55 U.S.L.W. 4405, 1987.)

SUPPLEMENT TO UNIT SIX

LEVEL OF SUSPICION REQUIRED FOR A REASONABLE SEARCH

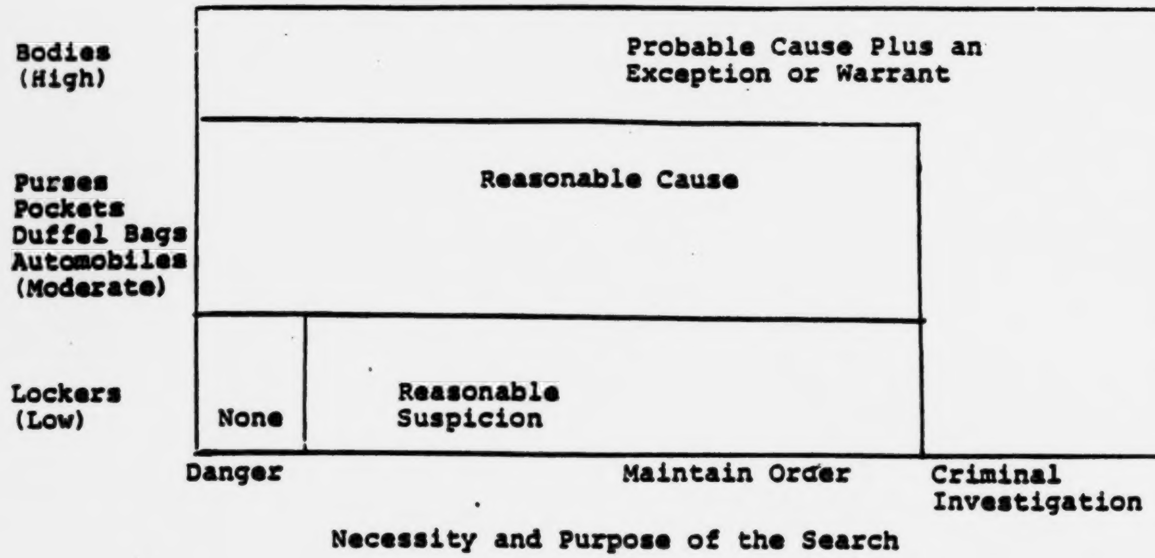
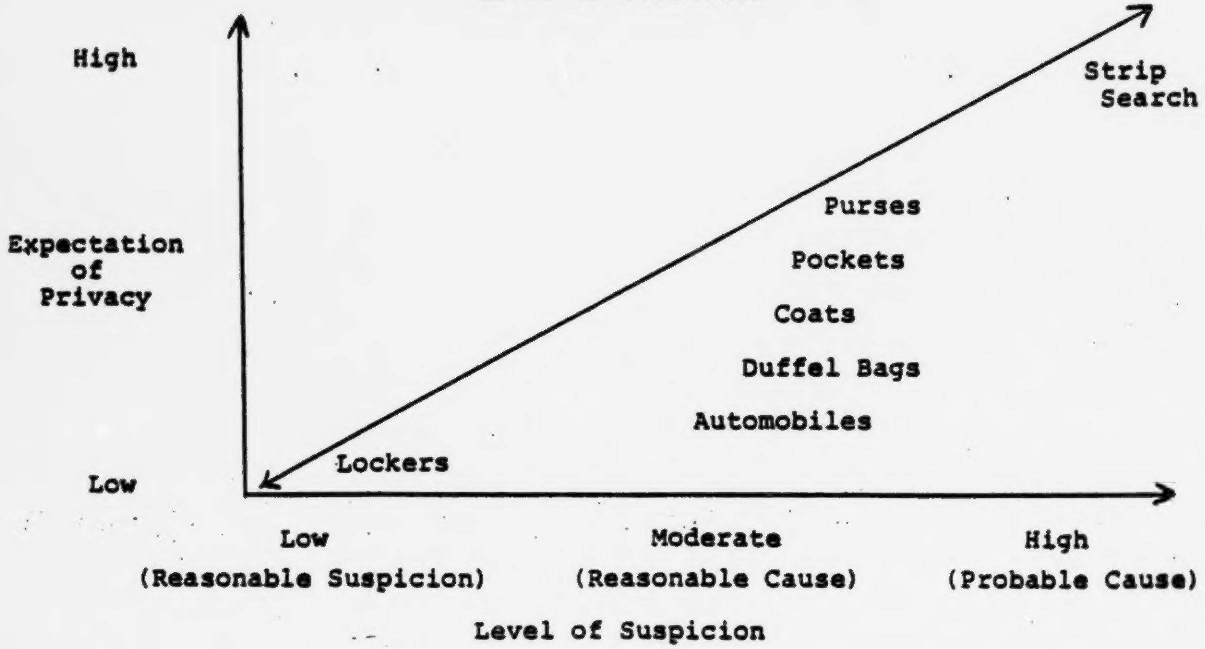

Bodies
(High)
Probable Cause Plus an
Exception or Warrant
Purses
Pockets
Duffel Bags
Automobiles
(Moderate)
Reasonable Cause
Lockers
(Low)
None
Reasonable
Suspicion
Danger
Maintain Order
Criminal
Investigation
Necessity and Purpose of the Search

Figure above adapted from Julie Underwood O'Hara in 13 Ed. Law No. 1(p.4).
Figure below adapted from Ivan B. Gluckman in 13 Ed. Law No. 2 (p. 206).

EXPECTATION OF PRIVACY
VS.
LEVEL OF SUSPICION



Form 35.25 Search warrants

SEARCH WARRANT

TO ALL PEACE OFFICERS IN THE COMMONWEALTH OF KENTUCKY:

You are commanded to search the house now used and occupied by ________________ as a residence, and the out-buildings and premises adjacent thereto, said residence being situated at ____________ [address (or, in ________ County)], Kentucky, and if you find on said premises or in or about said residence or building (here describe accurately articles to be searched for), you will seize and take possession of the same and deliver them together with this writ to me at my office as speedily as possible.

Witness my hand, as justice of the peace for ____________ County, this _______ day of ________, 19_____.

____
Justice of the Peace

Form 35.27 Consent to search

[Caption]

CONSENT TO SEARCH

I, _____________, having been informed of my constitutional right not to have a search made of the premises hereinafter mentioned with a search warrant and of my right to refuse to consent to such a search, hereby authorize _____________ [Name of officer or agent] and _____________[name of officer or agent], __________title of officers or agents and name of agency], to conduct a complete search of my premises including all out-buildings and automobiles located at _____________[address]. These officers or agents are authorized by me to take from my premises or automobiles any letters, papers, materials, or other property which they may desire. I understand that anything found on the premises can be used against me in a court of law.

This written permission is being given by me to the above named persons voluntarily without threats, or promises of any kind.

WITNESSES:

______________________________ Signed: ____________________

______________________________ Date: ____________________

AOC -79-340

Commonwealth of Kentucky
Court of Justice

Ky. Const. 10. RC: 13.10

SEARCH WARRANT

Case No. 12-82-XXXX

Court DISTRICT

County SCOTT

TO ALL PEACE OFFICERS IN THE COMMONWEALTH OF KENTUCKY:

Proof by affidavit having this day been made before me by TROOPER S.R. BRUMFIELD a peace officer of KENTUCKY STATE POLICE DEPARTMENT, that there is probable and reasonable cause for the issuance of this Search Warrant as set out in the affidavit attached hereto and made a part hereof as if fully set forth herein; you are commanded to make immediate search of the premises known and numbered as

XXXXXXXXXX RESIDENCE
XXX OREGON STREET
GEORGETOWN, SCOTT COUNTY, KENTUCKY.

and more particularly described as follows: Starting at the U.S. Post Office on U.S. 460 or Main Street in Georgetown, Scott County, Kentucky, travel East along U.S. 460 to Mulberry Street. Turn North or left on North Mulberry Street and travel North past Argos Place Alley to Oregon Street. Turn West or left on Oregon Street and XXX Oregon Street will be the second house on the South side of the street past the Wesley United Methodist XXX Oregon Street is a single story white frame house with a roof that slants from the front to the rear of the house. It has a front porch that has a green roof with white support columns. The front of the house has two doors in the center and a window on each side of the house front. The house is owned by XXXXX XXXXX and is occupied by XXXXXXXXXXX. The search will include all rooms, attic, closets, storage areas, and other parts in said dwelling house together with the surrounding grounds and any garages, storage rooms, and outbuildings of any kind attached or unattached located on the surrounding grounds.

and/or in a vehicle or vehicles described as:

and/or on the person or persons of:

XXXXXXXXXXXX black male DOB 03-09-39 occupant of the house.

the following described personal property:

Beer, whiskey, gin, vodka, rum, and any other alcoholic beverages and/or any evidence that alcoholic beverages are being sold in a local option territory.

If you find on said premises or in or about said residence, grounds, or buildings the articles searched for, you will seize and take possession of the same and deliver them together with this writ forthwith to me or any other court in which the offense in respect to which the property or things taken is triable, or retain it in your custody subject to order of said court.

______________________, 19___ ______________________

~~132~~ ______________________

Executed on this the 30 day of JULY 5:14 PM, 1983, by Officer Tpr. S.R. BRUMFIELD, of the KENTUCKY STATE POLICE, badge number 518, by searching said premises/vehicle/persons described herein and by seizing following:

1. FOUR (4) CASES OF MILLER HIGH LIFE BEER FORTY-EIGHT (48) QUART bOTTLES.
2. FOUR (4) CASES OF PABST BLUE RIBBON BEER FORTY-EIGHT (48) QUART bottLES.
3. TWO (2) 200 ML OF 90 PROOF ANCIENT AGE BOURBON.
4. ONE (1) BOTTLE 200 ML OF NIGHT TRAIN EXPRESS WINE.
5. THREE (3) ONE dollAR BILLS SER # D36169921A, B05591440B, J07642797A (NINE dollARS And THIRTY-TWO CENTS) 17 quARTERS, 33 dIMES, 7 PENNYS, 39 NICKELS. ONE GREEN MONEY bAG FROM FARMERS bANK.
6. ONE (1) R.G. 22 CAL. LONG RIFLE REVOLVER MODEL R G. 14 SER # L732388 AND A BROWN LEATHER HOLSTER.
7. ONE (1) SILVER 32 CAL. REVOLVER # A39653 ONE BIANCHI HOLSTER # 9-R

Search and Seizure Cases

1. Stein

On the night of January 22, 1968, a music store in Ottawa, Kansas was broken into and certain property was taken from the safe, including more than $200 in cash and currency, a paper sack of Kennedy half dollars, a 1798 silver dollar, other silver dollars, foreign coins, three revolvers and keys.

On the day following, two police officers visited the principal of the Ottawa High School who, at their request, and with the student's consent and on his own judgment, opened a student's school locker and brought its contents to his office. The student, Madison Stein, agreed that the officers might look through the contents of the locker, and a search thereof revealed a key in the bottom of a pack of cigarettes. The defendant said the key was to a locker in the Kansas City Union Station in which he had left some clothing on his return from Texas and that his parole master had refused to let him go to Kansas City to return his clothes.

When the officers suggested they would help him in getting his clothing, Stein accompanied them to the police station where a phone call to Kansas City disclosed there was no such locker at the station. Further investigation revealed that the key was to a locker at the Lawrence Bus Depot. A search warrant was obtained and the Lawrence locker yielded a considerable amount of cash and currency, a 1798 silver dollar, 8 other silver dollars, 52 half dollars, a paper sack with Butler's name thereon containing keys and foreign coins and a silver dollar with "Beth Butler" stamped therein. All this property was identified by Mr. Butler, owner of the music store.

Madison Stein was charged with second degree burglary and grand larceny. He was convicted on both charges and appealed.

At the trial the property taken from the Lawrence Locker was admitted into evidence after the court first heard testimony at an out of court hearing on the defendant's motion to suppress the evidence. This ruling was alleged to be error, the contention essentially being that Stein was not given a Mirarda* warning before he consented to the search of the school locker.

1. Did the principal have the right to open Stein's locker?
2. Should Stein's motion to suppress evidence have been granted?

3. Was the evidence sufficient for a conviction?

*The Miranda case requires police to inform suspects that they have the right to remain silent, that anything they say can be used against them, that they have the right to consult an attorney prior to questioning, that the attorney may be present during questioning, and that the court will appoint an attorney, if they cannot afford one.

2. L.L.

L.L. was a student in the Emotional Development Program at West Bend East (Wisconsin) High School. His teacher, Patrick Zukowski, had taken razor blades and a knife away from him on occasions. On September 28, 1977, L.L.'s behavior led his teacher to suspect that he might have something of a similar nature again. Zukowski demanded to see what was in L.L.'s shirt pocket. The teacher tried to reach inside the pocket, but was unsuccessful. He then said something which L.L. interpreted to mean that if he revealed the contents of the pocket, no action would be taken. Therefore, L.L. produced a hand-rolled cigarette from the pocket. Zukowski reported it to the principal, who called the police.

A hearing was held in juvenile court on a criminal charge, possession of marijuana. The search was not authorized by a search warrant and it was not a voluntary search based on informed consent, but coercive due to Zukowski's position of authority over the student.

1. Does the exclusionary rule (evidence illegally obtained cannot be used in court) apply?

2. Was Zukowski a state agent?

3. Was the search of L.L.'s pocket unreasonable?

4. In answering these questions, the court said there are four possible approaches:

   (1) the Fourth Amendment does not apply because the school official stands in the position of a parent, (2) the Fourth Amendment applies but the exclusionary rule does not, (3) the Fourth Amendment applies but the doctrine of in loco parentis lowers the standard applied in determining reasonableness, and (4) the Fourth Amendment applies and probable cause is required.

   Question: Which of the four approaches do you think should apply? Why?

3. Doe

In Highland, Indiana, school officials had become concerned with problems of drug use in the senior and junior high schools. Classroom disruptions and loss of learning time occurred as a result of disciplining those students found to have been using drugs in the school during school hours.

School officials conducted a search. Arrangements were made with the local police and volunteer canine units with specially trained dogs. On a particular day, all students were kept in their first period class for an extra one and one-half periods while the handlers led their dogs through the rooms for an inspection. Students sat quietly at their desks. If a dog showed "alert" signs in respect to a particular student, the plan was to have the student empty pockets and purses. If nothing was found at that point, the plan required the student to go to a private room and to strip off all clothing.

There was an agreement with the police that anything found as a result of the investigation would not be used in a criminal investigation. The information was to be used only by the school under its discipline policy.

Fourteen handlers and their dogs participated in the inspection. A dog alerted to one particular student on about fifty occasions. A nude body search was conducted on eleven students because a dog continued to alert after pockets had been emptied.

Questions:

1. Did the investigation on the particular day constitute a mass detention and deprivation of freedom in violation of the Fourth Amendment?

2. Was the entry by school officials into each classroom for five minutes a "search" contemplated by the Fourth Amendment?

3. Was the walking up the aisles and the sniffing by the dogs a "search" within the meaning of the Fourth Amendment?

4. Did the school officials overstep their rights when they conducted a pocket search in the furtherance of their legitimate interest in eliminating drug trafficking within the schools?

5. Was the nude body search legal?

4. Goose Creek

In response to a growing drug and alcohol problem the Goose Creek (Texas) Independent School District contracted with a security firm that has dogs trained to react to alcohol and various drugs. On a random and unannounced basis the dogs are taken to various schools in the district, where they sniff students' lockers and automobiles. They also are taken into classrooms, on leashes, to sniff the students themselves.

When a dog alerts to a student's person the student is taken to the office and subjected to a search of pockets, purse, and outer garments. No strip searches occur. When a dog alerts to an automobile, the student driver is asked to open the doors and trunk. If he refuses, the school notifies the parents. When a dog alerts to a locker, the school searches the locker without the consent of the student to whom it is assigned.

Questions:

1. Does sniffing of student lockers in public hallways constitute search?
2. Does sniffing of automobiles parked on public parking lots constitute search?
3. Does dogs' sniffing of students' persons constitute search?
4. Can the intrusion on dignity and personal security in canine inspection of students' persons be justified by the need to prevent drug and alcohol abuse?

5. Bellnier

On the morning of December 6, 1974, a fifth grade pupil at an elementary school in Auburn, New York, told a student teacher that $3 was missing from his coat pocket. The teacher appealed unsuccessfully to the class for information about the missing money. The regular teacher and the student teacher searched the outer garments hanging in the coatroom. Then they asked the students to empty their pockets and remove their shoes. The money was not found. The student teacher and another woman teacher took the girls to the girls' restroom. The regular teacher, another man teacher, and the principal took the boys to the boys' restroom. The students were ordered to strip down to their undergarments, and their clothes were searched. The money was never found.

Question: Was the search valid?

6. Louisville

An incident of alleged "strip searching" of 26 third graders in a Louisville, Ky., elementary school occurred in 1981.

On November 30, according to a spokesman in the superintendent's office, $4 was discovered missing from a third-grade classroom at Louisville Frayser Elementary School. After a search of lockers, desks, and wastebaskets, the teacher decided to check the children's clothing.

The extent of the search varied, but the boys were asked to "loosen their pants but they did not lower them." The girls were asked individually to enter a restroom and were required to "lower their underwear," the spokesman said. "No one was fully stripped naked."

Three teachers, all female, were involved in the search, without first notifying the school principal.

According to an attorney representing parents of the pupils who were searched, some boys were required to strip totally nude in a bathroom in front of a woman teacher and some of their peers. Likewise, some girls in the class were required to strip before another woman teacher and their peers.

"There was no urgency to recover the small amount of missing money," the attorney said. Moreover, the students were not advised of any charges against them, no law enforcement officials were called, and the pupils were denied due process rights guaranteed by the 14th Amendment, the attorney said. He also said there was no need for students to remove their underclothing since a wad of money would have been plainly visible.

"I don't believe that people ought to be teaching school who would do something like this," the attorney said.

Questions:

1. Do you think the search was justified?
2. If not, what recourse should be taken against the teachers?

7. Owensboro

During the school year 1981-82, Brad Rone was a fifteen-year-old male high school student at Daviess County High School.

On January 7, he gave two fellow students prescription medication, causing one student to feel dizzy and confused.

On January 27, Brad distributed a quantity of marijuana to two female students on the school bus.

On January 28, the day of the search in question, he subsequently admitted passing marijuana to another student. He further admitted that he had grown marijuana himself and had smoked it frequently.

Only after Brad had told the administrators that he had smoked marijuana, had possession of it, and had transferred it to another student was he requested to submit to a search. At no time during the search did he object to it. Rather, the evidence establishes that he voluntarily submitted to it and cooperated with the school officials throughout.

The search itself was conducted in the principal's office with only high school officials present. No law enforcement authorities were present.

Although Brad was requested during the search to lower both his trousers and undershorts, those articles of his clothing were never removed. Additionally, he was never offensively touched during any part of the search. The only clothing completely removed from the appellant was his jacket and shoes.

The avowed purpose of having Brad lower his shorts and undershorts to his thighs was to determine if either contained drugs or marijuana, underclothing being a prime hiding place for controlled substances.

No criminal charges were ever brought against Brad, the previous incidents remaining entirely within the realm of school discipline.

Questions:

1. Was the search legal?

2. If so, why? If not, why not?

3. Would the search have been legal had the police been involved?

8. T.L.O.

On March 7, 1980, a teacher at Piscataway High School in Middlesex County, N.J., discovered two girls smoking in a lavatory. One of the girls was the respondent T.L.O. who at that time was a 14-year-old high school freshman. Because smoking in the lavatory was a violation of a school rule, the teacher took the two girls to the Principal's office, where they met with Assistant Vice Principal Theodore Choplick. In response to questioning by Choplick, T.L.O.'s companion admitted that she had violated the rule. T.L.O., however, denied that she had been smoking in the lavatory and claimed that she did not smoke at all.

Choplick asked T.L.O. to come into his private office and demanded to see her purse. Opening the purse, he found a pack of cigarettes, which he removed from the purse and held before T.L.O. as he accused her of having lied to him. As he reached into the purse for the cigarettes, Choplick also noticed a package of cigarette rolling papers. In his experience, possession of rolling papers by high school students was closely associated with the use of marijuana. Suspecting that a closer examination of the purse might yield further evidence of drug use, Choplick proceeded to search the purse thoroughly. The search revealed a small amount of marijuana, a pipe, a number of empty plastic bags, a substantial quantity of money in one-dollar bills, an index card that appeared to be a list of students who owed T.L.O. money, and two letters that implicated T.L.O. in marijuana dealing.

Choplick notified T.L.O.'s mother and the police, and turned the evidence of drug dealing over to the police. At the request of the police, T.L.O.'s mother took her daughter to police headquarters, where T.L.O. confessed that she had been selling marijuana at the high school. On the basis of the confession and the evidence seized by Choplick, the State brought delinquency charges against T.L.O. in the Juvenile and Domestic Relations Court of Middlesex County. Contending that Choplick's search of her purse violated the Fourth Amendment, T.L.O. moved to suppress the evidence found in her purse as well as her confession, which, she argued, was tainted by the allegedly unlawful search.

This became the first school search case to reach the Supreme Court of the United States, which held that where a careful balancing of governmental and private interest suggest that the public interest is best served by a 4th Amendment standard of reasonableness that stops short of probable cause, such a standard is sufficient.

In other words, in this case: Reasonable suspicion was enough; probable cause was not required.

Other questions answered by the Court:

1. Does the 4th Amendment prohibit unreasonable searches by public school officials? Yes.

   a. Are public school officials agents of the state? Yes.

   b. Are school officials exempt from requirements of the 4th Amendment because of the special nature of their authority over school children? No. (In loco parentis is not entirely consonant with compulsory attendance laws.)

2. Does a pupil have a legitimate expectation of privacy in articles of personal property carried into school? Yes.

3. How then should we strike a balance between the schoolchild's legitimate expectation of privacy and the school's equally legitimate need to maintain an environment where learning can take place?

   a. We hold today that school officials need not obtain a warrant before searching a student who is under their authority.

   b. The legality of the search of a student should depend simply on the reasonableness of the search.

   c. Determining the reasonableness of any search involves a two-fold inquiry:

      (1) First, one must consider whether the action was justified at its inception. (There must be reasonable grounds for suspecting that the search will turn up evidence that the student has violated either the law or the rules of the school.)

      (2) Second, one must determine whether the search as actually conducted was reasonably related in scope to the circumstances which justified the interference in the first place. (The measures adopted must be reasonably related to the objective of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction.

4. Was the search of T.L.O. reasonable? Yes.

Questions not addressed in this case

1. Does a schoolchild have a legitimate expectation of privacy in lockers, desks, or other school property provided for the storage of school supplies?

2. What is the appropriate standard for assessing the legality of searches conducted by school officials in conjunction with or at the behest of law enforcement agencies?

3. Is individual suspicion an essential element in the reasonableness standard?

4. Are strip searches legal? (However, the court implied they are not. The majority responded to some other points in Justice Stevens' dissent, but offered no comment to his statement that "One thing is clear under any standard--the shocking strip searches that are described in some cases have no place in the schoolhouse." Previously, Justice Brennan had tried but failed to get the Court to accept the Doe v. Renfroe appeal so the court could rule on this very point.

UNIT SEVEN

LEGAL ISSUES RELATED TO SUPERVISION OF PUPILS' CONDUCT

I. TEACHER RIGHTS AND RESPONSIBILITIES

A. Rights

1. Inherent in the position of a teacher is the authority to make rules for the government of the school and the control of pupils' conduct.

   a. No board of education could possibly anticipate all acts of pupils or adopt rules covering all contingencies.

   b. Teachers may make and enforce reasonable rules and regulations to supplement board and administrative rules and regulations.

2. The teacher's authority extends beyond his own pupils to others in the school.

3. Teachers may use reasonable means of securing compliance with a rule.

   a. Both rules and means of compliance are presumed reasonable.

   b. The teacher is entitled to benefit of the doubt.

   c. Anyone challenging either the rules or means of enforcement must assume the burden of proving unreasonableness.

B. Responsibilities

1. Each teacher in the public schools shall fulfill the responsibilities required by Kentucky law. (See pages 35-37 above.)

2. Under common law each teacher has a duty to protect the health and safety of pupils.

3. Any school personnel in Kentucky who knows or has reasonable cause to believe that a child is an abused or neglected child shall report this to the Department of Human Resources or to an appropriate law enforcement agency. (KRS 199.335).

C. In Loco Parentis

1. Meaning - "In the place of a parent."

2. Scope

   a. A teacher does not have the authority of a parent in every respect.

   b. The teacher stands in place of the parent in matters relating to education.

   c. Private matters unrelated to education are not within the purview of the teacher under the concept of *in loco parentis*.

   d. The doctrine of *in loco parentis* is being limited somewhat by recent court decisions.

3. Control

   a. The *in loco parentis* principle is applied more often in cases of discipline than in any other area.

   b. In order to carry out the functions of the school, it is necessary for the teacher to direct the pupil and to punish him for infractions, much as a parent would.

4. Liability

   a. The right to control and supervise the pupil carries with it a correlative duty to act as a reasonable and prudent parent would in like circumstances.

   b. The rationale of *in loco parentis* does *not* apply, however, in determining liability for negligent tort against the pupil. In some jurisdictions the parent is not liable for negligent tort against his child, but the teacher may be. (Tort liability is discussed in Unit Eight below.)

   c. Out of *in loco parentis* relationship the courts have found an obligation on the part of the teacher to protect the students while in school from dangerous acts and harmful influences.

II. STUDENT RIGHTS AND RESPONSIBILITIES

A. Student Conduct

1. The constitutional rights of students must be balanced with the responsibility of the state to maintain order and discipline in its schools.

2. School authorities have the power to establish various rules and regulations concerning student behavior and to enforce them.

3. KRS 160.295 sets forth the procedures to be followed in creating a code of conduct of student rights and responsibilities in Kentucky Secondary Schools. The code may define rights and responsibilities related to:

    a. Right of expression, including, but not limited to, appearance, assembly, association, and circulation of petitions and literature;

    b. Right to participate in decision-making procedures directly affecting students;

    c. Right to procedural due process concerning major disciplinary action, as defined by the code;

    d. Right to receive academic grades based only upon academic performance;

    e. Right to freedom from abuse and threat of abuse by members of school faculties and administration personnel; and

    f. Right of access by a student to his or her own records and guarantee of the confidentiality of a student's academic records outside of the school system, except upon written authorization of the student or his or her parents or guardians.

4. The law states that students shall refrain from activity which materially or substantially disrupts the educational process or presents a clear and present danger to the health and safety of persons or property, or infringes on the rights of others.

B. Legal Status of Punishment

1. The power to enforce rules and regulations carries with it the power to impose penalties for misconduct. Punishment of students raises questions of their constitutional rights.

2. Substantive due process requires fairness in such matters as:

   a. Severity of the punishment should be related to the seriousness of the offense.

   b. A student should not be punished for breach of a regulation which is:

      (1) unreasonable;

      (2) beyond his power to comply;

      (3) one that he could not be expected to know about;

      (4) so vague that he does not know what is expected of him.

3. Assuming fairness, the constitutional status of forms of punishment is as follows:

   a. No constitutional issues are raised by such traditional forms of punishment as verbal chastisement, withdrawal of privileges, or writing assignments (such as writing an essay on good citizenship or writing "I will not talk in class" 100 times). The educational effectiveness of such punishment may be in question, but not the constitutionality.

   b. Detention (the keeping of pupils in at recess, after school, or requiring them to come in before school) does not raise a constitutional issue. It is neither false imprisonment nor a serious deprivation of liberty.

   c. In-school suspension (removal of students from the regular classroom and assignment to a special class) is not legally considered as suspension as the pupils are not excluded from school. It raises no constitutional issues.

   d. Requiring students to make restitution (by cleaning up a mess they made or by paying for damaged property) is constitutional. If the restitution is not made voluntarily, school officials may go to small claims court to collect damages.

   e. Academic penalties (such as grade reduction) as punishment for misconduct are inappropriate.

f. Corporal punishment is constitutional but may cause legal problems. (See below.)

g. Suspension, disciplinary transfers, and expulsion deprive students of liberty and property interests protected by the 14th Amendment. Due process of law must be provided. (See below.)

h. A student may waive his rights by informed consent. This means he may voluntarily agree to give up a particular right in any specific situation, provided he understands what his rights are and he waives them willingly, under no threat of coercion, or other undue pressue. For example, he may agree to be searched by school authorities when they do not have a legal right to search him. If he waives his right by informed consent, he cannot later sue them for an illegal search.

C. Corporal Punishment

1. Reasonable corporal punishment is legal in Kentucky. (Carr v. Wright, 423 SW 2d 521, 1968.)

2. Unreasonable corporal punishment may constitute assault and battery and be the basis of criminal charges or a tort suit. (See Unit Eight.)

3. Whether a particular punishment was reasonable is a question of fact to be considered by a jury. Factors taken into account include:

   a. Was the punishment confined within the bounds of moderation?

   b. Did the teacher act wantonly or from malice or passion?

   c. Was the punishment proportionate to the gravity of the offense and the apparent motive and disposition of the offender?

   d. Was consideration given to the age, size, and physical strength of the pupil punished?

   e. Was the instrument used suitable and proper for the purpose?

4. The reasonableness of punishment is always determined on the basis of the facts of a particular case. The following guidelines are suggested:

   a. Pupils should be informed in advance as to what behavior might lead to corporal punishment.

   b. Other methods of punishment should be tried first.

   c. The punishment should be administered in the presence of another teacher who is informed beforehand and in the student's presence of the reason for the punishment.

   d. The child's parent should be given a written explanation of the reason the punishment was administered and the name of the witness.

5. The primary purpose of corporal punishment is to deter future misconduct by inflicting pain, which may be accompanied by degradation or humiliation. Therefore, the infliction of pain, degradation, or humiliation does not make the punishment cruel, excessive, or unreasonable.

6. Corporal punishment does not violate students' constitutional rights.

   a. The Eighth Amendment's prohibition of cruel and unusual punishment was intended to protect persons charged with crimes from being tortured. It does not apply to corporal punishment of pupils in schools.

   b. Although a pupil has a minimal liberty interest in avoiding corporal punishment, the Due Process Clause of the 14th Amendment does not require notice and hearing before the imposition of such punishment in the public schools. (Ingraham v. Wright, 430 U.S. 651, 1977.)

   c. In a particularly brutal case of corporal punishment in New Mexico the 10th Circuit Court of Appeals found a constitutional violation of the right to substantive due process. (Garcia v. Miera, 817 F. 2d 650, 10th Cir., 1987.) The Supreme Court refused to grant certiorari in this case. (Miera v. Garcia, cert. den. 56 U.S.L.W. 3647, 1988.)

7. Corporal punishment is permissible, not mandatory, under the Constitution and Kentucky statutes.

   a. Local boards of education may adopt policies prohibiting or regulating corporal punishment.

   b. In the absence of school system policy, school principals may make administrative regulations prohibiting or regulating corporal punishment.

III. DUE PROCESS OF LAW IN SUSPENSION AND EXPULSION

A. Due Process Requirement

1. The 14th Amendment mandates that the state "shall not deprive any person of life, liberty, or property without due process of law."

2. In order for the right of due process to exist, a person must show that he was deprived of some liberty or property interest by government or by an agent of government, such as a public school official.

B. Substantive Due Process

1. Fairness requires that students be apprised of the kind of conduct that is proscribed. Regulations must not be so vague that a student of ordinary intelligence does not know what they cover, nor so overbroad that constitutionally protected behavior is prohibited.

2. KRS 158.150 meets the above criteria by listing the following behavior as cause for suspension or expulsion:

    a. Willful disobedience or defiance of the authority of teachers or administrators;

    b. Use of profanity or vulgarity;

    c. Assault or battery or abuse of other students or school personnel;

    d. The threat of force or violence;

    e. The use or possession of alcohol or drugs;

    f. Stealing or destruction or defacing of school property or personal property;

    g. The carrying or use of weapons or dangerous instruments;

    h. Other incorrigible bad conduct on school property as well as off school property at school sponsored activities.

C. Procedural Due Process

1. A pupil shall not be suspended from school until at least the following due process procedures have been provided:

   a. The pupil has been given oral or written notice of the charge or charges against him which constitutes cause for suspension;

   b. The pupil has been given an explanation of the evidence of the charge or charges if the pupil denies them; and

   c. The pupil has been given an opportunity to present his own version of the facts relating to the charge or charges. (KRS 158.150)

3. These due process procedures shall precede any suspension from the common schools unless immediate suspension is essential to protect persons or property or to avoid disruption of the ongoing academic process. In such cases, the due process procedures outlined above shall follow the suspension as soon as practicable, but no later than three (3) school days after the suspension. (KRS 158.150)

4. The superintendent, principal or head teacher of any school may suspend a pupil but shall report such action in writing immediately to the superintendent and to the parent, guardian or other person having legal custody or control of the pupil. (KRS 158.150)

5. These due process procedures for suspensions of up to 10 days are required both by Kentucky law and the United States Constitution. (Goss v. Lopez, 419 U.S. 565, 1975.) Suspensions of more than 10 days may require additional due process.

6. Transfers between schools of students for disciplinary reasons require due process similar to a 10-day suspension.

7. The board of education of any school district may expel any pupil for misconduct as defined in KRS 158.150, but such action shall not be taken until the parent, guardian or other person having legal custody or control of the pupil has had an opportunity to have a hearing before the board. The decision of the board shall be final.

8. A pupil expelled by a school board is expelled only until the beginning of the next school year. (OAG 74-165)

9. Because expulsion is a more serious deprivation of rights than is suspension, greater amount of due process is required. Additional process requirements are:

a. The notice must be in writing.

b. It must be delivered to the student's parents or guardian.

c. It must be received in time that the student can prepare a defense.

d. The student may be represented by legal counsel.

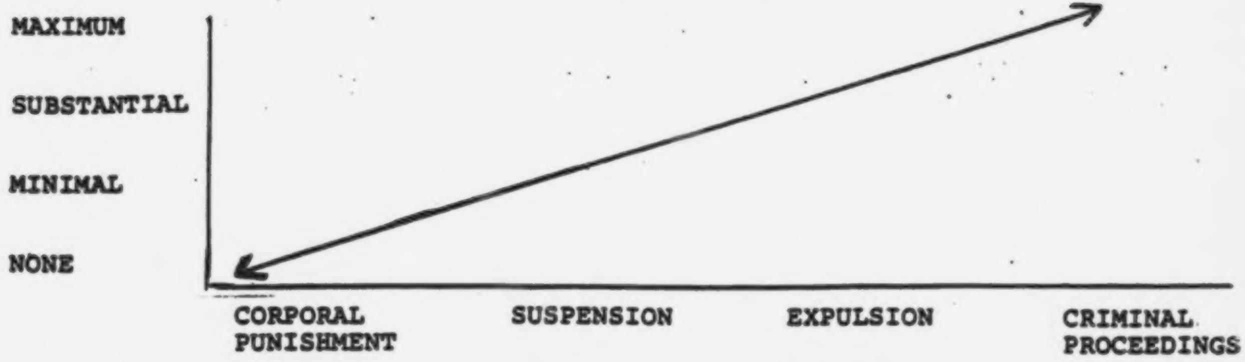
e. A written notification of the board's decision must be made to the student's parents. (OAG 78-673)

f. Some courts permit the student to subpoena and cross-examine witnesses.

10. The 6th Circuit ruled that in certain school expulsion cases the principal may investigate the credibility of witnesses, thus obviating the need to cross-examine witnesses in the school board hearing. (Newsome v. Batavia Local School Dist., 842 F. 2d 920, 1988.)

SUPPLEMENT TO UNIT SEVEN

AMOUNT OF DUE PROCESS OF LAW REQUIRED



The requirements of due process are flexible and different cases may require different procedural safeguards. If possible penalties are mild, quite informal procedures may be sufficient. More formal proceedings may be required where severe penalties may attach. (Gonzales v. McEuen, 435 F. Supp. 460, C.D. Cal. 1977.)

AMOUNT OF DUE PROCESS IN RELATION TO TYPE OF HEARING

	SUSPENSION	EXPULSION	JUVENILE COURT	CRIMINAL COURT
Oral or written notice of charges	yes	yes	yes	yes
Explanation of evidence	yes	yes	yes	yes
Opportunity to tell own side	yes	yes	yes	yes
Decision by impartial tribunal	yes (principal)	yes (board)	yes (judge)	yes (judge/jury)
Advance written notice				
of specific charges	no	yes	yes	yes
of names of adverse witnesses	no	yes	no	yes
of facts to which each witness will testify	no	yes	no	yes
Representation by counsel	no	yes	yes	yes
Right to present own witnesses	no	yes	yes	yes
Confrontation/cross-examination	no	yes/no*	yes	yes
Open, public hearing	no	no	no	yes
Transcript of proceedings	no	no	yes	yes
Privilege against self-incrimination	no	no/yes**	yes	yes
	MINIMAL	SUBSTANTIAL		MAXIMUM

*Most courts say yes; some say no. **Most courts say no; some say yes.

SUSPENSION - EXPULSION CASES

1. Clark County

During the weekend of September 27, 1980, three student members of the George Rogers Clark High School Marching Band consumed alcoholic beverages while on a school-sponsored band trip to Murray, Kentucky, in violation of school regulations. The school regulations state that suspension shall be mandatory for the first offense of this nature at school functions whether on or off school property and that the superintendent may recommend that offenders be expelled from school under the provisions of KRS 158.150.

The superintendent recommended expulsion, and, following a hearing at which numerous witnesses testified, the Board voted to expel the students until the beginning of the next semester in January, 1981. It further declared the students ineligible to participate in any extra-curricular activities until the beginning of the next school year.

The students sued, claiming that the regulation was invalid as exceeding the authority granted to school boards and that the expulsion was arbitrary in that the Board did not consider such factors as: The previous conduct of the students involved; the academic status of the students; the probability of recurring violations and consideration of alternative punishment.

Was the regulation invalid?

Was the expulsion arbitrary?

2. Piphus

Jarius Piphus was a freshman at Chicago Vocational High School during the 1973-1974 school year. On January 23, 1974, during school hours, the school principal saw Piphus and another student standing outdoors on school property passing back and forth what the principal described as an irregularly shaped cigarette. The principal approached the students unnoticed and smelled what he believed was the strong odor of burning marijuana. He also saw Piphus try to pass a packet of cigarette papers to the other student. When the students became aware of the principal's presence, they threw the cigarette into a nearby hedge.

The principal took the students to the school's disciplinary office and directed the assistant principal to impose the "usual" 20-day suspension for violation of the school rule against the use of drugs. The students protested that they had not been smoking marijuana, but to no avail. The assistant principal refused to listen to their protests and suspended them for twenty days.

Was this suspension legal?

3. Brisco

Silas Brisco was in the sixth grade at Clara Barton Elementary School in Chicago during the 1973-1974 school year. On September 11, 1973, Brisco came to school wearing one small earring. The previous school year the school principal had issued a rule against the wearing of earrings by male students because he believed that this practice denoted membership in certain street gangs and increased the likelihood that gang members would terrorize other students. Brisco was reminded of this rule, but he refused to remove the earring, asserting that it was a symbol of black pride, not of gang membership.

The assistant principal talked to Brisco's mother, advising her that her son would be suspended for 20 days if he did not remove the earring. Brisco's mother supported her son's position, and a 20-day suspension was imposed. Brisco and his mother filed suit in Federal District Court charging that Brisco had been suspended without due process of law in violation of the Fourteenth Amendment.

Was this suspension legal?

4. Wood

Two 16-year-old 10th grade students at the Mena (Arkansas) High School were charged with violating a school regulation prohibiting the use or possession of intoxicating beverages at school or school activities by "spiking" the punch served at a meeting of an extracurricular school organization attended by parents and students. The relevant facts begin with their discovery that the punch had not been prepared for the meeting as previously planned. The girls then agreed to "spike" it. Since the county in which the school is located is "dry," a third girl drove across the state border into Oklahoma and purchased two 12-ounce bottles of "Right Time," a malt liquor. They then bought six 10-ounce bottles of a soft drink, and, after having mixed the contents of the eight bottles in an empty milk carton, returned to school. Prior to the meeting, the girls experienced second thoughts about the wisdom of their prank, but by then they were caught up in the force of events and the intervention of other girls prevented them from disposing of the illicit punch. The punch was served at the meeting, without apparent effect.

Ten days later, the teacher in charge of the extracurricular group and meeting, having heard something about the "spiking," questioned the girls about it. Although first denying any knowledge, the girls admitted their involvement after the teacher said that she would handle the punishment herself. The next day, however, she told the girls that the incident was becoming increasingly the subject of talk in the school and that the principal would probably hear about it. She told them that her job was in jeopardy but that she would not force them to admit to what they had done. If they did not go to him then, however, she would not be able to help them if the incident became "distorted." The three girls then went to the principal and admitted their role in the affair. He suspended them from school for a maximum two-week period, subject to the decision of the school board. He also told them that the board would meet that night, that the girls could tell their parents about the meeting, but that the parents should not contact any members of the board.

Neither the girls nor their parents attended the school board meeting that night. Both the teacher and the principal, after making their reports concerning the incident, recommended leniency. At this point, a telephone call was received by the superintendent of schools, from a teacher at the high school, who reported that he had heard that the third girl involved had been in a fight that evening at a basketball game. The superintendent informed the meeting of the news, although he did not mention the name of the girl involved. The recommendations of leniency were withdrawn, and the board voted to expel the girls from school for the remainder of the semester, a period of approximately three months.

Was this expulsion legal?

5. Section 1983

42 U.S.C. Section 1983 permits the assessment of damages against school officials if they took action which they knew or reasonably should have known would violate the constitutional rights of any student.

Could such damages be assessed against either of the Chicago principals or against the Arkansas School Board in the above cases? If so, in what amount?

6. Pegram

Three junior high school students in Greensboro, N.C., were accused of stealing a billfold containing $65 from a woman sitting in front of them at a basketball game. The three were searched, and $20 was found on one boy and $22 on another. No money was found on Chester Pegram, although the other two boys said he participated in the theft. The principal called Chester's father and discussed the incident with him and other witnesses. Chester persisted in his denial.

The principal suspended Chester for 10 days and imposed an additional penalty forbidding him to be on school grounds after 3:15 p.m. for the remainder of the year (which happened to be four months). This penalty deprived the student of the opportunity to participate in many extracurricular activities. However, as far as the record revealed, the only spring-term extracurricular activities in which Chester had expressed an interest were track and the prom.

The student had been given notice of the accusations, he had been given an opportunity to tell his side of the story, and the principal had interviewed four students whose names had been given to him by the plaintiff.

> Was this a sufficient amount of due process considering the severity of the deprivation?

7. John A.

Following a high school freshman football game in San Bernardino, California, an altercation involving some of the players took place. No school district employees were present. Subsequently, one student's mother informed the school that her son had been assaulted and injured. A vice principal was assigned to investigate. Several of the other students named John as the one who committed the assault, but John denied this.

John was then suspended. In accordance with California law, the principal then recommended that the plaintiff be expelled. The student's mother was notified by letter that a hearing had been scheduled on the proposed expulsion and that at the hearing John and his mother would have an "opportunity to participate in the discussion of his case." They were informed that they could "present evidence, both oral and documental." They were also notified that they could be accompanied by a friend or adviser or that they might "employ and be represented by counsel."

The hearing was conducted before a three-member panel of school district employees not employed at the school attended. John, his mother and the vice principal who conducted the investigation were present. The chairman of the panel began the hearing by telling John and his mother that the hearing was being held so that they may hear the charges and the information gathered by the school district staff, have a chance to refute or add to that information, and to make statements on behalf of the student. The principal's recommendation to the superintendent urging John's expulsion was read into the record and the vice principal's investigative report, including the statements of the participating students, were presented.

John was then asked, "What exactly happened that day after the football game?" He denied striking or kicking the other students. This was consistent with the statement that he made to the vice principal. It, however, was in conflict with the written statements of the majority of the other students. John was then expelled for the remainder of the school year.

The student subsequently filed a lawsuit contending that he was denied procedural due process at the hearing.

Questions:

1. Specifically, what process could John claim that he was entitled to but denied?
2. Would you agree with his claims?
3. How would this be handled differently if in Kentucky rather than California?

8. Tibbs

On October 7, 1970, two students at the Franklin, (N.J.) High School, were assaulted by a group of others, all or mostly girls, while all were walking home after classes, a short distance from the school exits. They were struck with a stick, pushed to the ground and jumped upon or kicked, and some of their possessions were taken from them. One of them had her eyeglasses broken. Both had minor injuries. They ran, crying, back to the guidance office at the school. It appears that neither could, or was willing to, identify any of their attackers. But a number of student witnesses volunteered statements to the school authorities identifying about ten students as involved in the episode. They were apparently assured, upon request, that they would not be identified to the accused students because of fear of physical retaliation.

Tanya's parents were given notice October 27, 1970, by the superintendent of schools that the board of education would meet November 2, 1970, for a full hearing to consider the recommendation of the school principal and himself that the girl be expelled from school for "assault upon a student of Franklin High School;" that they could be represented by an attorney; that the vice-principal and principal would testify and be subject to cross-examination, and that signed statements of student witnesses would be presented but that such students would not appear at that hearing. The accused pupil would have the right to present testimony of witnesses or a signed statement by any witness not desiring or able to attend.

At the hearing before the board, the principal and vice-principal of the high school testified concerning their investigation and the informal hearings they conducted, resulting in findings and conclusions as indicated above, including that of Tanya's guilt. The principal also testified that he had received a telephone call from the mother of one of the accused students threatening the life of one of the prospective student witnesses. There was testimony that the student witnesses were in terror of retaliation if their identity was revealed to the accused students. The principal explained that the problem he faced in deciding whether to produce the children to testify was a two-fold one: "What happens within the confines of a racially tense school; and my own concern for the continued safety of the students involved." (There had been a history of racial conflicts at the school.) The board voted to accept into evidence unsigned and unidentified statements by student witnesses, and three such were read into the record. In each such statement Tanya was identified as one of those "doing the hitting." A statement by the victims was also read. This described the occurrence but omitted identification of any assailant.

The attorney for Tanya objected throughout the hearing to the failure to identify and produce and subject to cross-examination any of the accusing witnesses whose statements were read.

The board of education voted Tanya guilty and then took testimony concerning her prior disciplinary record in school. This was generally poor. After argument by counsel against expulsion the board voted that determination.

> Was Tibbs provided due process?
>
> Should she have the right to confront and cross-examine witnesses against her? Was there any way to get the truth and protect witnesses against retaliation?

Search or Suspension Case

On a spring day at Dixie Heights High School in Kenton County, Kentucky, the work of the school was disrupted several times by the setting off of party poppers, a type of small firecracker. A teacher caught some girls with the firecrackers and sent the students to the Dean's Office. The girls told the Dean they had got the poppers from Sheila Barr, a freshman student. The Dean called Sheila to the office and asked to search her purse. Sheila refused. The Dean consulted with the principal, James Jenkins. Jenkins asked to search the purse; Sheila refused. Thereupon the principal told her that if she did not comply she would be suspended from school for five days. Meanwhile, the Dean of Girls called Sheila's mother and told her of the impending suspension and that the punishment would be less severe if the search was allowed. Mrs. Barr supported her daughter's refusal to consent to the search of her purse. The principal suspended Sheila for five days. (Sheila then took a box from her purse; one of the 25 firecrackers it had contained was still in the box.) Terms of her suspension were that Sheila would not be allowed to make up any school work, assignments, or tests missed during the period of her suspension.

Was a warrantless search justified in this case?

Could the principal have searched Sheila's purse without her permission?

Should he have done so?

Was her suspension justified?

Was the refusal to permit her to make up school work missed during the suspension an impermissible academic penalty for misconduct?

UNIT EIGHT

TORT LIABILITY

I. LAW OF TORTS

A. Definition

1. A tort is any civil wrong, other than breach of contract, for which a court will award damages.

2. A tort may be committed against either a person or his property, including both real property and intangible assets (such as his reputation).

3. Tort actions are brought in civil rather than criminal court and are governed by the law of torts, which in many ways is quite distinct from criminal and contract law.

B. Torts Classified

1. Intentional torts are not only those where purposeful harm was done to another person but also those where the harm resulted as an unintended consequence of a wanton or malicious act.

Common examples of intentional torts are:

Assault or battery
False imprisonment
Defamation of character

2. Negligence is the failure to exercise the degree of care for the safety and well-being of others that a reasonable and prudent person would have exercised under similar circumstances.

(This classification is useful primarily for discussion purposes. Legally there is little difference between intentional and negligent torts, except for insurance purposes. In addition, certain intentional torts may also be crimes under criminal law.)

3. Strict liability may be applied in cases wherein a thing or activity is unusually hazardous. In such cases a person may be liable even though fault is not shown. (Strict liability is seldom awarded in school cases, but it is a possibility in laboratory experiments, shop activity, or certain field trips.)

4. Torts are sometimes classified as errors and omissions.

    a. An error is doing the wrong thing (malfeasance) or doing the right thing in an improper manner (misfeasance).

    b. An omission is a failure to do something that ought to be done (nonfeasance).

II. TORT LIABILITY OF SCHOOL TEACHERS

A. General

1. Everyone is legally responsible for his own torts.

2. The doctrine of respondeat superior (the employer is responsible for the torts of an employee functioning in the line of duty) does not exempt school employees from liability.

3. Governmental immunity that school districts may have does not apply to employees.

4. Kentucky does not have a "save harmless" law requiring school districts to pay judgments awarded against their employees.

B. Intentional Torts

1. Assault is an attempt or threat to harm another physically.

    a. Assault is limited to intentional conduct.

    b. Assault consists of an act other than the mere speaking of words which directly or indirectly is a legal cause of putting another in apprehension of an immediate and harmful or offensive contact.

    c. Whether an assault exists in a given case depends upon the apprehensions created in the mind of the person assaulted.

    d. The injury received by a person assaulted is not necessarily physical. The mental distress of the assaulted person may be a very material injury.

    e. Verbal chastisement of pupils is not considered assault, even though it may result in severe emotional distress.

f. Disparaging comments about a pupil are not actionable unless maliciously or wantonly made. Then they are more likely to constitute defamation than assault.

2. Battery is wrongful physical violence inflicted on another without his consent.*

   a. In order to constitute battery an act need not involve bodily harm, but it must involve contact with another person (or with a thing so closely attached thereto as to be regarded a part thereof; e.g. his clothing) and be offensive to a reasonable sense of personal dignity. (Spitting on a person or kissing a person against his will are examples of "offensive" batteries, which do not cause bodily harm.)

   b. Most tort actions against school teachers for battery arise from unreasonable corporal punishment or other unreasonable use of force.

   c. Corporal punishment is likely to be ruled unreasonable if it:

      (1) is administered with malice or in anger,

      (2) is cruel or so excessive as to leave permanent marks or injuries. (However, bruises are not necessarily evidence of excessive punishment.)

   d. The United States Supreme Court has ruled that corporal punishment, even when excessive, does not constitute cruel and unusual punishment as prohibited by the Eighth Amendment, and that pupils need not receive procedural due process of law before corporal punishment is administered. (Ingraham v. Wright, 430 U.S. 651, 1977.)

   e. Parental objection will not render corporal punishment tortious. (Baker v. Owen, 395, F. Supp. 294, M.D. N.C. 1975, Aff'd. 423 U.S. 907, 1975.)

   f. The courts have held that a reasonable use of force may be justified in:

      (1) self-defense,

      (2) stopping a pupil from hurting himself,

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*Some jurisdictions no longer use the term "battery," but use "assault" as an inclusive term.

    (3) preventing one pupil from hurting another,

    (4) forcibly removing a dangerous or unlawful object,

    (5) restraining a pupil from damaging school property.

3. False Imprisonment

    a. False imprisonment is the intentional locking of a person in a room against his will.

    b. The writers of this book are not aware of any cases wherein a teacher has been successfully sued for false imprisonment.

    c. In Kentucky a teacher may legally detain a student for a reasonable period of time after school hours for failure to prepare his lessons (OAG 61-293).

4. Defamation

    a. Defamation involves the communication to third persons of false statements which injure one's reputation.

    b. If the defamation is communicated in writing, printing, or pictures, it is libel.

    c. If it is communicated by word of mouth or gestures, it is slander.

    d. In order to constitute the tort of libel or slander, the following elements must be shown:

        (1) The defamatory statement was communicated to one other than the defamed party.

        (2) The statement brought hatred, disgrace, ridicule or contempt on another person.

        (3) Damages resulted from the statement. However, damages need not be shown where:

            (a) the statement charges that a person committed a crime,

            (b) the statement charges that he has a loathsome disease,

            (c) the statement charges that a person, if a woman, is unchaste,

    (d) the statement is so derogatory as to injure the person in his trade or business.

e. A person who repeats or republishes a defamatory statement made by another is liable even though he discloses the source of his information.

f. Truth is at least a partial defense against defamation.

  (1) The burden of proof is on the defendant.

  (2) Truth may not be a defense when releasing the statement constitutes an invasion of privacy.

g. Certain communications are classified as privileged (exempt from tort of defamation).

  (1) Official statements by judges in connection with judicial proceedings, by lawmakers during legislative sessions, and certain communications by executive officers of government made in discharging their duties are exempt - as absolute privilege.

  (2) Statements made by school board members in executive session about the professional fitness of an employee and resolutions of dismissal adopted in open meetings are privileged.

  (3) Teachers have "conditional privilege" in communicating defamatory material:

    (a) to authorized people,

    (b) through official channels,

    (c) as long as the facts are well observed and they believe the material is true.

  (4) Conditional privilege does not protect the teacher from suit when:

    (a) the information is released to unauthorized people,

    (b) there is malice on the part of the teacher, or

    (c) the teacher does not have good reason for believing the statement is probably true.

C. Negligence

1. Negligence is defined as the failure to exercise the degree of care for the safety and well-being of others that a reasonable and prudent person would have exercised under similar circumstances.

2. Standard of Care Required

   a. The standard of care required of a school teacher is that behavior which a person of ordinary prudence, charged with like duties, would engage in under similar circumstances.

   b. Because of compulsory attendance laws, the in loco parentis concept, and of statutes such as KRS 161.180, teachers have a legal duty to maintain a much higher standard of care for safety of pupils than the ordinary citizen has for his fellow citizens.

   c. A standard of care which is adequate in dealing with adults generally will not be adequate when dealing with children. The more immature the child, the greater the amount of care due.

   d. Circumstances include mental capacity of the actor, age, knowledge, skill, and physical conditions. (Greater care due handicapped than "normal" children.)

   e. The standard of care owed to a person on school premises is also dependent upon whether the person is a licensee or an invitee.

      (1) A licensee is a person whose presence is permitted but has not been invited (such as a child using the playground on a holiday or when school is not in session).

      (2) An invitee is one who enters the premises at the invitation of the owner. Pupils participating in school curricular activities are regarded as invitees.

      (3) A much higher standard of care is required for the safety of invitees than of licensees.

3. The "Reasonable Man Rule"

   a. A person of ordinary prudence is defined by the courts in terms of the "reasonable man."

b. The "reasonable man" has the following characteristics:

(1) the physical attributes of the defendant,

(2) normal intelligence,

(3) normal perception and memory,

(4) such superior skill and knowledge as the actor has or holds himself to the public as having.*

4. Burden of Proof

a. When a tort is alleged to have been committed, the person who claims to have been injured by the alleged tort must establish:

(1) the defendant had a duty to protect the complainant against unreasonable risk of injury;

(2) the defendant breached the duty; i.e., did not exercise a reasonable standard of care; and

(3) the breach of duty by the defendant was the proximate cause of the injury.

b. "Proximate cause" means that a direct and unbroken chain of events existed between the breach of duty complained of and the injury to the complainant.

c. An intervening act (an action by another party) may become a superseding cause which breaks the chain of causation. Whether the intervening act removes the proximate cause is partially determined by whether it is reasonably foreseeable. The questions for the jury are: Would the plaintiff's harm have not occurred _but_ _for_ the defendant's negligence? Would a reasonably prudent person have foreseen a danger in the breach of duty?

d. Burden of proof in a negligence case is upon the complainant except when the rule of _res ipso loqutur_, "the thing speaks for itself" is invoked. Example - a three-year-old child was left at a nursery school in the morning in good health. When picked up in the afternoon, the child had a brain concussion. In this case school officials had the burden of proof to show negligence had not occurred.

*A. P. Herbert, _Misleading Cases in Common Law_. After reviewing the reasonable man rule, Herbert wrote: "In all that mass of authorities which bears upon this branch of the law, there is no single mention of a reasonable woman." Cited by Ruth Alexander and Kern Alexander in _Teaching and Torts_, Middletown, Ky.: Maxwell Publishing Co., 1970.

5. Legal Defenses Against Charges of Negligence

   a. Contributory negligence. If the defendant did not intend to harm the complainant, and the latter failed to exercise reasonable care, this defense might be used. Age, experience, and intelligence of the complainant are taken into account. A child under seven, for example, could not be expected to exercise much care.

   b. Comparative negligence is when relative blame is apportioned. If both parties are negligent, the teacher may be liable for only part of the damages.

   c. Assumption of risk is a defense that means the complainant entered into the situation voluntarily and in full knowledge of the danger.

      (1) Courts are reluctant to allow this defense in cases where a pupil is injured on grounds that a child may not fully appreciate dangers involved.

      (2) Assumption of risk is almost never accepted as a defense when pupil is injured while participating in a classroom activity, for his participation is held not to be truly voluntary. (Teachers in shop classes, chemistry labs, etc. must exercise high standard of care.)

      (3) Assumption of risk is not an acceptable defense on school field trips. Permission slips signed by parent excusing school from liability for field trip injuries will not stand up in court. A parent cannot waive the right of the pupil to obtain redress for injury.

      (4) Assumption of risk can be used as a defense against the normal hazards associated with interscholastic sports. The doctrine applies only to those dangers normally attached to the activity in question; it does not excuse negligent treatment of injuries; willful or wanton injury, or other risks not normally associated with the activity.

D. Willful and Wanton Misconduct

   1. Willful or wanton misconduct is difficult to classify as an intentional or unintentional tort.

2. It is usually an act committed with a reckless disregard for the safety of others.

3. Willful and wanton misconduct is considered a more serious offense than mere negligence and may result in criminal charges as well as tort action. Example - an injury in an automobile accident caused by reckless driving.

E. Educational Malpractice

1. Schools and teachers have never been held liable for negligent teaching since classroom methodology affords no readily acceptable standards of care or cause of injury. (Peter W. v. San Francisco Unified School District, 131 Cal. Rptr. 854, Cal. App. 1976.)

2. However, in a Maryland case the court held that parents were entitled to bring suit against school officials for intentionally and maliciously injuring their child by providing false information about the pupil's learning disability, by changing school records to "cover up" their actions, and by demeaning the child. (Hunter v. Board of Education, 439 A. 2d 582, Md. App. 1982.)

F. Exemption

KRS 411.148 exempts from liability for civil damages those employees who render care or treatment at the scene of an emergency, provided such persons have completed a course in first aid in accordance with standards promulgated by the American Red Cross.

III. LIABILITY OF ADMINISTRATORS

A. Personal Liability

1. School administrators, like teachers, may be held liable for injuries sustained by others as a result of their personal negligence.

2. In most cases the school administrator has a general duty of supervision rather than a duty to supervise specific activities.

3. In those cases wherein an administrator does have the duty to supervise specific activities, he may be held liable if he fails to supervise them adequately.

4. An administrator may be held liable if he fails to provide for the supervision of pupils in the lunchroom or on the playground.

5. An administrator may be held liable if he fails to establish rules and regulations for the safety of pupils at school and on their way to and from school.

B. Liability for Negligence of Others

1. Ordinarily, school administrators will not be held liable for the negligence of teachers or other subordinates.

2. A school administrator will not be held liable for the acts of a competent teacher. The duty of the administrator is to employ competent teachers, not to supervise their every act.

3. A school administrator may be held liable for the acts of subordinates if he participated in them or ordered them done.

4. A school administrator may be held liable for the acts of an incompetent subordinate if he employed the subordinate knowing he was incompetent.

5. A school administrator may be held liable for assigning a subordinate to duties for which that subordinate is inadequately prepared.

6. A school administrator may be held liable for negligently or intentionally failing to exercise general supervision over those persons under his supervision.

IV. LIABILITY OF OTHER SCHOOL EMPLOYEES

A. The common law doctrine that everyone is responsible for his own torts applies to all classes of school employees.

1. Student teachers and volunteers, although not school employees, are liable for their own torts.

2. According to Kentucky law boards of education may use teacher's aides in supervisory capacities, such as playground, hallway, lunchroom, and cafeteria supervision. While so engaged aides have the same authority and responsibility (liability) that teachers have in the performance of similar duties (KRS 161.180).

3. A school board may employ security guards and station them on the school premises. The authority of security guards is limited to their assigned duties. They do not replace teachers in the maintenance of school discipline. (OAG 72-180)

B. The position of school bus driver entails special responsibilities for the care and safety of children.

1. Courts are in disagreement as to whether school bus drivers must exercise "ordinary" care of the prudent person or the "highest degree of care."

2. A school bus operator has a duty to pick up and discharge riders at a reasonably safe place.

3. A school bus driver's duty to discharge passengers safely extends until the child is safely off the highway.

4. A school bus driver's responsibility does not include protecting a child from injury while walking from the bus stop to his home.

V. LIABILITY OF SCHOOL BOARD MEMBERS

A. Discretionary Duties

1. In exercising discretionary duties an individual member of the board cannot be sued for board action, providing the board acts in good faith and in its area of authority.

2. Board members cannot be made liable for any injury growing out of a conscientious mistake or error in judgement, however great it may be.

3. An individual member may be held liable if activated by malice, intent to injure, or by a corrupt motive.

B. Ministerial Duties

1. Where duties are ministerial, school board members can be held personally liable for losses suffered by others because of their nonfeasance or misfeasance, as well as malfeasance.

2. Board members are not ordinarily personally liable for damages arising from their failure to perform a duty, or for negligent performance, where the specific duty is imposed on the board in its corporate capacity.

3. However, courts sometimes do hold board members individually liable in such cases.

   a. Where boards refuse to follow specific statutory procedures, individual liability may result.

   b. Board members frequently are held personally liable for illegal expenditures made or approved by them.

C. Damages

1. Violation of clearly established constitutional or statutory rights by board members may allow them to be sued in federal court under the Civil Rights Act of 1871. (42 U.S.C. Section 1983.)*

2. Violation of procedural due process rights by board members may allow them to be sued for compensatory damages if actual injury can be shown.

3. In case of actual malice or wantonness, punitive damages may be awarded.

VI. SCHOOL DISTRICT LIABILITY

A. Doctrine of Governmental Immunity

1. The common-law rule that an agency of government is not liable for torts applies to school districts, which are legally regarded as agencies of the state.

2. The unfairness of sovereign immunity has led many states to abolish school district immunity.

   a. The legal rationale supporting sovereign immunity was refuted by the Illinois Supreme Court in a decision binding only in that state but persuasive to courts in many other jurisdictions. (Molitor v. Kaneland Community Unit District No. 302, 163 N.E. 2d 89, Ill. 1959.)

   b. At least 30 states have since 1959 limited school district immunity either by legislation or by court decision.

3. The doctrine of governmental immunity still holds in Kentucky. (Wallace v. Laurel County Board of Education, 200 SW 2d 736, 1947, plus many other decisions.)

*School board and school district liability under Section 1983 is discussed in Unit Ten, below.

B. Exceptions to Governmental Immunity

1. Safe-place Statutes

   a. Some states have laws requiring public buildings, including school buildings, to be constructed and maintained so they are safe for users.

   b. Kentucky does not have a safe-place statute.

      (1) Because a school district has sovereign immunity it does not need premises liability insurance; thus, Kentucky school districts cannot purchase such insurance without an enabling statute. (OAG 74-746)

      (2) A school board may purchase fire insurance in a "package policy" containing general liability insurance, only if there is no separate premium for liability coverage. (OAG 66-36)

2. Save-harmless Laws

   a. Some states have laws requiring or permitting school districts to pay money damages awarded against an employee covered by the provisions of the statute.

   b. Kentucky does not have a save-harmless statute. Kentucky school districts cannot legally reimburse employees for tort damages awarded against them nor can school districts be sued for the negligence of their employees. (Wood v. Board of Education, 412 SW 2d 877, 1967.)

3. Transportation

   a. Several states have limited governmental immunity by making school districts liable for injuries sustained while being transported by the district.

   b. Kentucky statutes authorize boards of education to provide liability insurance for the operators of school buses and other mobile equipment owned by the board. (KRS 160.310)

      (1) The fact that the board is authorized to carry liability insurance does not make the district responsible for the negligence of its agent in transporting pupils. (Wallace v. Laurel County Board of Education, *supra*.)

(2) No school funds may be used to assist an injured party in a school bus accident. (Taylor v. Knox County Board of Education, 167 SW 2d 700, 1942.)

(3) There is no liability on the part of the school district to pay the hospital bills of a bus driver injured while operating a school bus with faulty steering mechanism. (OAG 41-702)

c. Kentucky statutes require the contractor to carry liability insurance in those districts wherein the transportation of pupils is let out under contract. (KRS 160.310.)

4. Nuisance and Trespass

a. Courts in several states have held that school districts are liable to one who suffers damage as a result of the creation of a nuisance by a school district or for trespass by the school district.

b. No cases of Kentucky school districts being held liable for nuisance or trespass have been reported. Sovereign immunity of the district is likely to be upheld in such cases. (Copley v. Board of Education, 466 SW 2d 952, 1971, and Petus v. Board of Education, 378 SW 2d, 1964.)

C. Proprietary Functions

1. Some courts distinguish between the governmental functions of school districts, which are covered by sovereign immunity, and proprietary functions, which are not so cloaked.

2. Proprietary functions refer to activities not assigned to a school district by law, which are voluntarily assumed, and for which fees are charged. Examples are athletic functions to which admission is charged and the rental of school facilities to a community organization.

3. Some courts have held that a school district has no power to engage in a proprietary function; it has power only to operate schools, and all school activities must, therefore, be governmental activities.

4. Kentucky courts have not ruled directly on the question of proprietary functions of school districts.

a. Therefore, one might assume that school districts in this state have immunity in all functions.

b. However, the City of Lexington was held liable for a child who drowned in a municipal swimming pool, so cities in Kentucky have lost tort immunity in proprietary functions. (Haney v. City of Lexington, 386 SW 2d 98, 1965.)

VII. INSURANCE

A. School District

Liability insurance for school districts was discussed in Section VI above.

B. Personal Liability

1. Some school boards purchase liability insurance for their teachers and other employees.
2. Members of the National Education Association are automatically provided liability coverage. Additional protection may be purchased.
3. Liability insurance for administrators may be available through administrator associations.
4. Liability insurance is available commercially for persons not otherwise covered or who wish supplemental coverage.
5. School personnel are well advised to have sufficient liability insurance. In order to know if his coverage is adequate, a school employee or official should examine his policy to see what things are covered and what are excluded.
6. Insurance for Kentucky school board members is available through the Kentucky School Boards Association.

C. Workmen's Compensation

1. Workmen's compensation laws provide compensation for all workers who are injured in the course of their employment, regardless of fault.
2. According to Kentucky statutes every employee and official of a Kentucky school district is covered by workmen's compensation insurance while performing his official duties. (KRS 342.640.)

SUPPLEMENT TO UNIT EIGHT

WHO CAN BE SUED FOR NEGLIGENCE

Betty Lou Whitt, a pupil in the Sumpsonia School in Graves County, Kentucky claimed to be seriously injured when she attempted to drink at a school water fountain and boiling water was expelled into her face.

On her behalf a suit was brought alleging that the Principal negligently installed the plumbing and the hot water system; that the Maintenance Supervisor negligently failed to inspect the installation and negligently installed additional defective plumbing; that the Janitor, with knowledge of the defective condition, negligently failed to shut off the water fountain; that the School Superintendent negligently employed the Maintenance Supervisor and violated certain statutes; and that the members of the Board of Education individually employed the Principal to do the work, knowing him to be unqualified, and were otherwise negligent.

The suit alleged that the Superintendent, Principal, Maintenance Supervisor and Janitor were negligent in the performance or nonperformance of their ministerial duties. The allegations stated a cause of action against them as individuals.

With respect to the members of the Board of Education, it was alleged they violated certain statutes when they undertook to authorize the alterations in the school building which resulted in the defective condition causing the plaintiff's injury.

A further alleged ground of the Board members' liability is that they negligently employed and authorized the Principal to install the plumbing at the school when they knew, or ought to have known, he was not qualified to perform this work.

The Court of Appeals of Kentucky was asked to decide which of the above named defendants could be sued. What would your decision be?

NEGLIGENCE

Did the teacher exercise the proper degree of care in the following case? Should the pupil be awarded money damages to compensate for the injury? If there is contributory or comparative negligence, what proportion should be assessed against each party?

1. Under the direction of a teacher, Lillian Wesley, the choral class of the Union County (KY) High School presented the play "Little Abner." The script called for the three "Scaggs

Brothers' to shoot at a "little old lady" as she fled across the stage. Kathy Louise Page, the student-actress playing the "little old lady," was wounded by a projectile, 2-1/2 to 3 inches in length, that consisted of a plastic shotgun wad and tightly rolled newspaper. The teacher testified that at the time it was decided to use shotguns and live ammunition, she instructed the boys regarding the preparation of the ammunition. They were to remove the shot, wadding and the powder from the shells so that the only noise produced would be from the detonation of the primer. However, she admitted that at no time during practice or on the night of the play did she supervise the preparation of the ammunition, inspect it after it was prepared, nor examine the guns. One of the boys testified that in order to make the loud noise Wesley requested, he rolled up the newspaper and put it in the ends of the shells after the shot had been removed. The immediate cause of the injury suffered by Kathy was being struck by such a projectile.

The principal, Richard Vincent, had delegated to Lillian Wesley the direction of the play. He testified that he usually cautioned students in regard to bringing guns to school, but in this instance, he failed to caution the boys, but relied upon Wesley to do so. On the night of the play, he was at Murray State University attending a class.

The student and her mother sued the teacher and the principal for negligence.

2. A similar incident occurred in New Mexico. Gilbert Sanchez, a teacher at Mora High School, directed the senior class play. The script called for a blank cartridge to be fired at one place in the play by Gabriel Bustos, and for this purpose Bustos furnished his own gun. When not being used in the play, the gun was kept in the office of Max Valdez, the principal. Only Bustos and Kenneth Medina, another student actor, were to have access to the gun. Just prior to the final performance of the play George Chavez, another member of the cast, got the gun without the knowledge of either Valdez or Sanchez, inserted a live bullet in it and fired the pistol, injuring Jackie Ferreira, a student-actress. This occurred while Sanchez was helping apply make-up to the cast, and the gun was lying on a table on the stage. The play had been rehearsed over a period of time, and two actual performances had been given on the preceeding nights. All of the students in the cast were responsible and dependable and had conducted themselves in an exemplary manner. Prior to the shooting no person except those members of the cast having the authority to use the weapon had touched it.

Suit was brought against Sanchez and Valdez for negligence.

3. Charles Russell Cox, an 18-year-old senior in the Fredonia (KY) High School, was a candidate for valedictorian of his class. He had at his disposal an automobile which his father had purchased for him and he frequently managed his father's feed mill business. He had reached the age of majority under the law of Kentucky.

Charles and approximately 30 other members of his graduating class went on an all-day outing to Kentucky Dam State Park. While swimming in Kentucky Lake Charles was drowned. His estate administrator sued Wanda Barnes, a teacher; Robert Hooks, the school athletic director and basketball coach (who was to serve as bus driver and lifeguard if there was swimming); and Riley Dennington, the school principal, claiming that their negligence resulted in the loss of life. The students in company of Mrs. Barnes, her husband, Reverend Barnes, and Hooks first had lunch in a restaurant about one-half mile from the beach area. They proceeded by bus to the beach, which was not officially open. Signs at various places said that no lifeguards were on duty and others read "Swim at your own risk." Members of the class engaged in different types of activities. Five of the boys swam out to a diving tank about 35 or 40 yards from shore. On the tank was a sign that read "off limits." Meanwhile, Rev. and Mrs. Barnes and Hooks, none of whom changed to swimming clothes, were at various places along the beach. There was no lifesaving equipment present, although they had brought along a rope which had been misplaced.

Charles and two other boys stayed in shallow water, declining an invitation to join the boys who had gone to the diving tank, but after those three engaged in some horseplay they started swimming toward the tank. Although Charles still had on trousers he appeared to be swimming well, but when he was within about ten feet of the tank he grabbed one of the boys and pulled him under. It was then apparent that he was in distress. The boys on the tank aided Charles's two companions to the tank. They tried to get Charles there but he slipped away from them, disappeared under the water, and did not reappear.

About the time the three boys neared the tank a boat approached the area, and the boys on the tank signalled to it to help. Mrs. Barnes, not realizing that assistance was needed, waved the boat away from the swimmers as she considered it improper for the boat to be in the bathing area. The boat moved away, but apparently realizing that aid was sorely needed, returned too late to be of assistance. About that same time Hooks removed some of his clothing, swam out to the tank, and dove many times as did others, but they were not able to locate Charles in time to save his life. Later the body was found about five feet from the tank.

4. As a college student Lyle Lundquist had done his student teaching in physical education and during the fall and winter after he graduated he had worked as a substitute physical education teacher for a limited number of times. In March he acquired a full-time position at the Graham (Minn.) Junior-Senior High School as a replacement for a teacher who had to report for military duty. When Jack Peterson, the principal, learned the exact date the former teacher would be leaving, he instructed him to meet with Lundquist to plan the physical education classes for the remainder of the year. Peterson gave no instructions about the plan to be formulated. The teachers met for about 30 minutes. Their discussion about gymnastics was limited to whether a unit in gymnastics had been taught and the possibility of Lundquist's teaching such a unit. Lundquist told Peterson what he planned to teach, but Peterson asked him no questions and did not ask him to submit a detailed written plan of what he was going to teach.

   During the ninth class period that Lundquist taught he had the class do an advanced gymnastic exercise, the headspring, before the class had participated in the less advanced exercises. Furthermore, he did not have a spotter assigned to straddle the mat, using the weight of his body to anchor the mat and using his hands to assist and provide protection to the person performing the headspring. An eighth-grade student, Steven Larson, in attempting the exercise by running and diving onto the mat and landing on his head, broke his neck. The injury resulted in quadraplegic paralysis.

   Both Lundquist and Peterson were sued for negligence.

5. Jodeen Miles was a 17-year-old senior at Gurley (Neb.) High School. She had taken Shop I in her junior year under Ronald Shearer and in her senior year enrolled in Shop II, also taught by Shearer. At the beginning of the year Shearer issued each student a safety booklet and required students to pass a safety exam before they could use power tools. Jodeen received a grade of 68 percent on the test; 70 percent was a passing grade. Students who failed were required to refer to the manual and write the correct answers to the questions they had missed. Following this procedure, Jodeen answered all of the questions correctly. Then she was permitted to use power tools. When she commenced using the jointer in planing corners from a block of wood to make it cylindrical, Shearer demonstrated by running a piece of wood through the machine several times while Jodeen watched. Then he observed her repeat the operation. The next day Shearer adjusted the machine at the proper angle and watched Jodeen run the wood through at least once. Then he turned his attention to other students in the class. Jodeen continued

working for 5 or 10 minutes, then decided to quit for the day. While the machine was still running, she attempted to remove the wood from the infeed table, even though she had pushed the guard away from the rotating blades, thus exposing them. Her left hand came into contact with the blades. Two fingers were cut off.

6. Fred Bechtel was a music teacher in the Clinton (Conn.) Public Schools. Kenneth Sansone, twelve years of age, was a student in Bechtel's class. One day Kenneth and three other boys were misbehaving in class by interposing improvised sounds in a song which the class was supposed to sing in unison. Before this event Kenneth had never been a disciplinary problem in Bechtel's class. At the disruption Bechtel did not caution Kenneth or speak to him about his conduct but instead grabbed him by the arm and projected him from his chair into a movable chalk board. He then took Kenneth into the corridor where he grabbed the boy's arm and swung him against a wall. Kenneth was neither engaging in any tumultuous behavior nor threatening Bechtel or any other person. He was not struggling nor did he offer any physical resistance to the teacher's forceful discipline. As a result of Bechtel's conduct Kenneth sustained a displaced fracture of the clavicle. Kenneth charged the teacher with causing personal injuries as a result of unintentional trespass to the person (negligent assault and battery).

7. Richard Dailey, a nine-year-old fourth grader at the Rowan County (KY) Elementary School, had been taking an achievement test with his class. At the direction of his teacher, Pat Binion, the class was allowed to have a recess.

   Binion testified that she instructed the class to run around the high school track which circled the perimeter of the high school football field adjacent to the elementary school. Other testimony concerning this stated that the instructions by Binion allowed her class the discretion of playing in and or around the football field or running around the high school track. Some students in fact ran around the track, while others played in and or around the football field but not on the track.

   In any event, Richard Dailey along with several of his classmates, walked across the football field and across the track and began playing with a two-man "tackling dummy." The tackling dummy was a device which was intended to be used by the high school football team and although it was made entirely of iron, Richard's classmates were able to lift the "tackling dummy" off the ground. Richard apparently dropped a pen or some other article. While attempting to retrieve this from under the "tackling dummy," his fellow students because of the rather significant weight dropped this piece of equipment on Richard Dailey, resulting in his death.

Binion has testified that she observed the incident in question but because of the fact that it occurred within a matter of seconds, she was unable to take any preventive action. However, other students said that the occurrence of the "tackling dummy" being lifted off the ground took place over a course of minutes and that after the instrument had fallen on Richard Dailey, students went to advise Binion and she was totally unaware of the accident.

Suit was brought against Binion; John H. Brock, Superintendent of Schools; and Clifford Cassity, Principal of the Rowan County Elementary School.

Reasonable Use of Force?

Reasonable use of force, legal corporal punishment, or assault and battery?

Has the teacher committed a crime, a tort, or merely done his duty?

1. Ethel Owens was a 69-year-old school teacher in Gallatin County, Kentucky with 48 years of experience. She had been warned of threats by certain pupils to injure her; wherefore, she carried a sneeze-gun, a small pencil-like device which, when activated, discharges a substance which causes temporary eye irritation to the person affected.

   One day Owens took Brenda Hopkins, a high school student, to the office because she violated a school rule. The next morning the teacher arrived early at school for the purpose of discussing it with the principal. Shortly thereafter, Brenda and another girl stationed themselves at the door of Owens's room. Whenever the teacher passed through the doorway to ascertain whether the principal had arrived, the girls bumped into her. Finally, Owens and Brenda started shouting at each other; whereupon a large group of pupils, teachers and office personnel appeared. Brenda was told to go to the office with a secretary. Claiming that Owens had made vile remarks about her, Brenda left the secretary and returned to the place where Owens was standing. The teacher immediately sprayed the girl with the squeeze gun. Suit was brought against Owens. What were the charges?

2. Jimmy Pharr was a student at Sarepta (La.) High School where paddling was a frequent form of punishment. One day he did not line up properly for a foot racing event in his physical education class. The teacher, Zolon Stiles, who had a paddle in his pocket, hit Jimmy with the paddle. Jimmy again lined up incorrectly. Stiles hit him twice again, and Jimmy tried to break away. Stiles continued swinging the paddle, which broke. The teacher picked up one piece and continued striking the boy. After class Jimmy complained to the principal, Harold Newsom, showing him the marks in his backside. That evening Jimmy's mother took him to a physician, who found that he had multiple bruises of the body - behind the right ear, the left shoulder, the left buttock and left thigh. Two months later Jimmy was hospitalized for three days in an effort to determine the origin of headaches which Jimmy claimed began after the whipping. The medical evidence did not indicate that

the headaches were the result of the whipping. (Before the whipping Jimmy had frequently been absent from school and gave headaches as an excuse.)

Stiles was sued for unreasonable use of force and Newsom for negligence in that he should have known of Stiles's dangerous propensities and taken steps to correct them. (One previous complaint had been made against Stiles for excessive punishment. On that occasion he had been exonerated.)

3. Reginald Frank was participating in a junior high school physical education class in New Orleans. The teacher, Edward Henderson, demonstrated to the class the technique of shooting lay-ups and had the students standing in two lines, so each of them could execute a lay-up shot in turn. Reginald did not perform his shot correctly, so Henderson ordered him to the sidelines. When the balls rolled toward him, Reginald twice picked up a ball and got back in line. Henderson ordered him off the court both times. When Reginald came onto the court a third time, Henderson grabbed him, lifted him from the ground, shook him in anger, and finally released him suddenly, so he fell to the floor and broke his arm. Henderson claimed he acted in self-defense because Reginald threatened to hit him, a charge that Reginald denied. Henderson was 34 years old, 5 feet 8 inches tall, and weighed 230 pounds. Reginald was 14 years old, 4'9" tall, and weighed 101 pounds. Henderson was sued for assault.

4. Richard Simms was a 14-year-old student in the eighth grade at a school in Portland, Oregon. He had a poor record as a student, and had been in trouble for skipping school, fighting, and failing to complete his assignments. Marvin Weitz was his history teacher. In class one day Richard was not doing his assignment, but engaged in a game of dozens with a fellow student (a game in which the participants insult each other's mother). After telling Richard three times to be quiet, with no success, Weitz ordered him out of the room. He refused to go and called the teacher a vulgar name, so Weitz took him by the arm and led him from the room, with Richard protesting and struggling all the time. When they reached the door, which was closed, Weitz let go of Richard's arm to open the door. Richard swung at the teacher, missed him, and rammed his arm through the window, cutting it as the glass broke.

   Weitz was sued for assault and battery.

5. Mervin R. Lutz, a Canton (Ohio) grade school principal and teacher, with good reason believed a pupil, eleven-year-old Samuel Kafidies, had thrown a stone while on the way to school

at a little girl schoolmate and then fibbed about it. The stone knocked off the little girl's glasses and might have seriously injured her eyes. Lutz paddled Samuel for his actions. The paddle used was of normal proportions. Samuel was severely spanked from six to fifteen times. His buttocks were vividly discolored, black and blue, which cleared up in about five days with some tenderness remaining longer. He was an epileptic since infancy, and he had three such fits after the paddling. The spanking was witnessed by his room teacher. The next day the boy's parents and older brother took him to the office of the Superintendent of Schools, who saw the bruises, listened to their complaint, but took no action. They then took him to the County Juvenile Court and had a talk with the Boy's Probation Officer there, who took no action. They then went to a Police Court and filed an affidavit. On the following Tuesday the boy returned to school and was then examined by the school doctor and the school nurse. By this time the discoloring was entirely gone.

Lutz was charged in criminal court with assault and battery.

6. Haley Streeter was 12 years of age and a student in the fourth grade at the Chouteau Elementary School in the city of St. Louis. She had a history of disciplinary problems, having been suspended from three other schools for fighting and was one of the ring leaders of an unruly and disobedient group of students in the class.

John L. Hundley was assigned to teach Haley's class. He was the third teacher assigned to that class during a four-months period. Because of the undisciplined nature of the class, Hundley brought several rattan sticks to the class shortly after taking it over for use in administering corporal punishment, if necessary. Although no written permission had been granted by her mother, Hundley administered corporal punishment to Haley on two occasions prior to the incident with which we are concerned here. Both the girl's mother and Mr. Hunter, the school principal, knew of these incidents but made no comment to the teacher.

One day Haley returned 55 minutes late from the lunch period and entered the cloakroom, a storage area for supplies and personal belongings, to which access was generally denied the students. After repeated requests to return to the classroom went unheeded, Hundley removed Haley from the cloakroom and put her in front of the class, in spite of her resistance and repeated cursing. Hundley told her to put her hands on the door knob of the closet where he kept the rattan sticks. She either refused and kept her hands at her sides or if she did put them on the door knob, removed them after the switching started. Hundley took her by the left arm and, according to him, switched her on the buttocks three times. Haley said he struck her "about eight" times on her arm, hand, buttocks and thigh. Both agreed that she was wriggling, squirming and twisting, trying to avoid him and that the injury complained of to her right hand and wrist occurred when she put her hand behind her to ward off a blow. The girl then ran from the room, continuing to curse Hundley as she went. The entire occurrence took place in the presence of Ella Pearson, a practice teacher.

Hundley was sued for battery.

7. Frank Rolando, a tenured teacher, was employed to teach the sixth grade at the Lincoln Grade School in Oglesby, Illinois. It is evident that he encountered some serious disciplinary problems as the result of misconduct on the part of five or six students, all of whom were boys. These students would not remain seated, made various kinds of noises, interrupted other students, threw paper wads, erasers, and ball point pens. There is also evidence in the record that one boy or possibly two boys drew pornographic pictures and another recited a filthy poem. There is no question but what there was a disciplinary problem in the sixth grade class. Confronted with this situation Rolando procured a cattle prod, two feet long with electrodes on one end that delivered a shock upon contact. Throughout almost an entire month Rolando used the cattle prod to discipline unruly students. During this period of time five and possibly six boys were each on one or more occasions disciplined by an electric shock from the cattle prod. The recipients of the electric charges testified that such treatment hurt, stung, and made them shaky. Two students cried when a shock was administered to them. Several students asked the teacher not to shock them with the cattle prod, but instead they preferred to have their name written on the blackboard under the caption of "Cowards List." Other students, both boys and girls in the sixth grade class, witnessed the use of the cattle prod. They considered the reactions of the recipients as being funny and that the disciplinary treatment was a "big joke."

On occasion Rolando would assure a student that he would not apply the cattle prod to him if he would behave, i.e., sit down at his desk, yet after the student complied the teacher, contrary to his statement, would administer an electric shock to the student.

The superintendent and principal of the school heard rumors as to the teacher's use of the cattle prod on students. Upon being interviewed Rolando admitted that he had used the prod for disciplinary reasons on certain children because they were bad.

Charges were brought for Rolando's dismissal. What charges could be used to fire him? Would the courts uphold dismissal upon appeal?

UNIT NINE

RACIAL SEGREGATION

I. EARLY CONSTITUTIONAL CHALLENGES

A. Privileges and Immunities

1. The Fourteenth Amendment prohibits any state from making or enforcing "any law which shall abridge the privileges and immunities of citizens of the United States."

2. The Fourteenth Amendment applies only to those privileges growing out of federal citizenship not to those emanating from state citizenship. (Slaughter-House Cases, 83 U.S. 74, 1873.)

3. Education is a privilege conferred by the states and, therefore, is not a privilege safeguarded by the Fourteenth Amendment. (Marshall v. Donovan, 73 Ky. 681, 1874.)

B. Separate but Equal

1. The Fourteenth Amendment makes it unlawful for any state to "deny to any person within its jurisdiction the equal protection of the law."

2. State legislatures may require separate but equal accomodations for the races. (Plessy v. Ferguson, 163 U.S. 537, 1896.)

3. According to the Kentucky Court of Appeals in 1918, where separate schools are provided for white and "colored" children, no one is denied equal protection of the law so long as both classes of children are afforded substantially the same educational opportunity. (Daviess County Board of Education v. Johnson, 200 S.W. 313, 1918.)

4. The Kentucky Court of Appeals upheld an arrangement whereby the city of Mayfield levied a tax on the property of white people for the benefit of a school for white children and a tax on the property of black people for the benefit of a school for black children. (Crosby v. Mayfield, 117 S.W. 316, 1909.)

5. The same court, however, held that corporations are neither white nor black and that taxes raised from corporate property must be apportioned between the two schools in the ratio of the pupils enrolled in each. (Trustees of Graded Free Colored Common Schools of City of Mayfield v. Trustees of Graded Free White Common Schools of Mayfield, 203 S.W. 520, 1918.)

6. In 1908 the Supreme Court of the United States upheld the "Day Law," which had been enacted by the Kentucky legislature to prohibit integration at Berea College. The Court held that Berea, although a private college, was a corporation of Kentucky and therefore subject to state regulation. (Berea College v. Kentucky, 211 U.S. 45, 1908.)

7. When schools were segregated by race, the courts were frequently called on to determine who are "colored persons" within the meaning of the statutes.

    a. The Kentucky Court of Appeals held that "any appreciable admixture of negro blood constitutes a colored person within the meaning of the law governing school attendance. (Mullins v. Belcher, 134 S.W. 1151, 1911.)

    b. The Supreme Court of the United States held that a child of Chinese ancestry could be excluded from white schools and assigned to "colored" schools in Mississippi. (Gong Lum v. Rice, 275 U.S. 78, 1927.)

C. How Equal Must Separate Schools Be?

1. The Supreme Court of the United States held that school authorities could temporarily close the Negro high school for lack of funds while retaining the white high school. (Cumming v. Board of Education, 175 U.S. 528, 1899.)

2. The Supreme Court of West Virginia ruled that school terms of five months for black children and eight months for whites were illegally discriminatory. (Williams v. Board of Education, 31 S.E. 985, 1898.)

3. A federal court of appeals ruling that white and black public school teachers similarly situated and qualified must be paid equal salaries was sustained when the Supreme Court of the United States denied certiorari. (Alston v. School Board, 311 U.S. 693, Cert. denied, 1940.)

4. Most courts tended to agree with the Supreme Court of North Carolina that "much must be left to the good faith, integrity and judgment of local boards in working out the difficult problem of providing equal facilities for each race." (Lowery v. Board of Graded School Trustees, 52 S.E. 267, 1905.)

D. The Erosion of Separate but Equal
   (A series of decisions of the Supreme Court of the United States between 1930 and 1950 signalled the inevitable end of the separate but equal doctrine.)

1. A state must provide equal facilities within its own borders and cannot circumvent the responsibility by paying tuition for a student to attend an out-of-state school (Missouri ex rel Gaines v. Canada, 305 U.S. 337, 1938.)

2. The state must provide education in conformity with the Equal Protection Clause for any race and provide it as soon as it does for applicants of any other race. (Sipuel v. Board of Regents, 332 U.S. 631, 1948, and Fisher v. Hurst, 333 U.S. 147, 1948.)

3. Educational facilities and services must be truly equal - in terms of faculty, library, students, reputation, and prestige. (Sweatt v. Painter, 339 U.S. 629, 1950.)

4. A black student admitted to a state university must be permitted access to the classrooms, library, and cafeteria. (McLaurin v. Oklahoma State Regents, 339 U.S. 637, 1950.)

II. THE BROWN DECISIONS - The End of DeJure Segregation

A. Brown I and Companion Cases

1. Segregated facilities in Topeka, Kansas, were held to be socially and psychologically damaging even though equal, but the district court said that under stare decisis it could do nothing. (Brown v. Board of Education, 98 F. Supp. 797, D. Kan., 1951.)

2. Litigants proved that Negro schools in Clarendon County, South Carolina, were inferior and ordered that equal facilities be provided. The district court refused to declare segregation illegal. (Briggs v. Elliott, 103 F. Supp. 920, E.D.S.C. 1952.)

3. A district court in Virginia found that Negro schools in Prince Edward County were inferior and ordered that equal facilities be provided, but refused to order black children to be admitted to white schools. (Davis v. County School Board of Prince Edward County, 103 F. Supp. 337 D. Va., 1952.)

4. In Delaware the State Supreme Court ordered black children be admitted to white schools until such time as the Negro schools were made equal to the white. (Gebhart v. Belton, 91 A. 2d 137, 1952.)

5. The four cases above cited were combined and argued before the Supreme Court of the United States, which rendered its decision on May 17, 1954.

    a. The doctrine of "separate but equal" has no place in public education. Separate educational facilities are inherently unequal.

    b. The cases were restored to the docket for arguments on the formulation of implementation decrees. (Brown v. Board of Education, 349 U.S. 294, 1954.)

6. On the same day that the Court gave the Brown decision, it also ruled that segregation in the schools of the District of Columbia was a violation of the due process clause of the Fifth Amendment. (Bolling v. Sharpe, 347 U.S. 497, 1954.)

B. Brown II

1. The implementation decision was announced on May 31, 1955.

2. The cases were remanded to the federal district courts, with general directions to be followed by the courts below in arriving at specific terms of more detailed decrees.

    a. The courts will require that the defendants make a "prompt and reasonable start toward full compliance with the May 17, 1954 ruling."

    b. The courts may consider problems related to the transition to a racially nondiscriminatory school system and allow time for the elimination of obstacles in a systematic and effective manner.

    c. The vitality of constitutional principles cannot be allowed to yield simply because of disagreement with them.

d. The District Courts shall enter such orders and decrees as are necessary to admit to the public schools "with all deliberate speed" the parties to these cases. (Brown v. Board of Education, 349 U.S. 294, 1955.)

C. Efforts to Avoid Compliance

1. The postponement of desegregation cannot be justified because of violent opposition from segments of the community or local government. "Law and order are not to be preserved by depriving children of their constitutional rights." (Cooper v. Aaron, 358 U.S. 1, 1958.)

2. Closing the public schools of a county and using tax funds to support private schools, while other counties in the same state provided public education was ruled unconstitutional. (Griffin v. County School Board of Prince Edward County, 377 U.S. 218, 1964.)

3. A one grade per year plan for desegregating that left the high schools still segregated in 1964 was overturned. (Rogers v. Paul, 382 U.S. 198, 1965.)

4. "Freedom of Choice" plans that did not lead to desegregation were ruled inadequate. In 1968 school boards were told to "come forward with a plan that promises realistically to work...now." (Green v. School Board of New Kent, 391 U.S. 430, 1968.)

5. Courts have ruled many times that tuition grants to assist children to attend segregated schools are unconstitutional. Two such rulings have been affirmed by the Supreme Court of the United States. (Brown v. South Carolina Board of Education, 393 U.S. 222, 1968, and Poindexter v. Louisiana Financial Assistance Commission, 393 U.S. 17, 1968.)

6. State encouragement of private school segregation by providing textbooks to children attending such schools was ruled unconstitutional. (Norwood v. Harrison, 413 U.S. 455, 1973.)

7. In 1969 the Supreme Court of the United States held that the policy of allowing "all deliberate speed" for desegregation is no longer constitutionally permissible." It stated that "the obligation of every school district is to terminate dual school systems at once and to operate now and henceforth only unitary schools." (Alexander v. Holmes, 396 U.S. 19, 1969.)

D. Means of Compliance

1. In 1971 the Supreme Court of the United States approved a desegregation plan that included:

   a. limited use of mathematical ratios to achieve a goal of racial balance among pupils;

   b. school board plans to avoid all but a small number of one-race schools;

   c. non-contiguous school attendance zones even if these are "on opposite sides of the city;"

   d. extensive busing, insasmuch as "desegregation plans cannot be limited to the walk-in school." (Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 1971.)

2. Gerrymandering of attendance areas, pairing of schools, extensive busing, the assignment of pupils on the basis of race all are acceptable if done to overcome the effects of past segregation.

3. The courts have not required racial balance in all schools, nor ordered the elimination of all one-race schools. However, the burden will be on school authorities to show that a one-race school in a biracial district is not the result of discrimination.

III. De FACTO SEGREGATION

A. Definition and Status

1. De facto segregation exists in fact and not as a matter of law.

2. De facto segregation does not violate the Constitution unless it was caused by governmental action.

B. Effect or Intent

1. If school authorities practice purposeful segregation, the school district will be required to take affirmative measures to correct the resulting racial imbalance. (Keyes v. School District No. 1, 413 U.S. 189, 1974.)

2. If the effect of governmental action is to promote segregation, but there was no discriminatory intent, courts are divided on the necessity of desegregation. (For a discussion, see Columbus Board of Education v. Penick, 443 U.S. 449, 1979, and Dayton Board of Education v. Brinkman, 443 U.S. 526, 1979.)

3. Once a district has desegregated its schools and resegregation occurs from housing shifts without official action, the district does not have an obligation to desegregate again. (Pasadena City Board of Education v. Spangler, 427 U.S. 424, 1976.)

IV. INTER-DISTRICT REMEDIES FOR SEGREGATION

A. Metropolitan Solutions Not Required

1. A district court order requiring merger of the predominantly black Richmond with predominantly white suburban schools was overturned by the Fourth Circuit Court of Appeals. The circuit court ruling was affirmed by an equally divided Supreme Court without opinion. (Bradley v. School Board of the City of Richmond, 338 F. Supp. 67, reversed 462 F. 2d 1058, affirmed 412 U.S. 92, 1973.)

2. The Supreme Court of the United States reversed a lower court order for a "metropolitan solution" involving Detroit and over 50 nearby school districts, holding that before cross-district busing could be imposed it must be shown that discriminatory acts of the state or of local districts have been a substantial cause of interdistrict segregation. (Bradley v. Milliken, 418 U.S. 714, 1974.)

B. Metropolitan Solutions Required

1. The Sixth Circuit Court of Appeals upheld a district court plan for a metropolitan solution in the Louisville area, where there had previously been de jure segregation and school district boundaries had been ignored in the past to segregate the schools. (Newburg Area Council v. Board of Education, 510 F. 2d 1358, 6 Cir. 1974.)

2. The Supreme Court refused to overturn a metropolitan solution ordered in the Wilmington area, where the actions of Delaware state government and cross-district collaboration had created segregated schools. (Evans v. Buchanan, 555 F. 2d 373, 3 Cir.; 434 U.S. 880, 1977, cert. den.)

V. TEACHER DESEGREGATION

A. Assignment of Staff

1. In 1965 the Supreme Court ruled that the racial distribution of teachers should be considered in school desegregation. (Bradley v. School Board, 382 U.S. 103, 1965.)

2. In 1965 the Supreme Court approved a district court order requiring faculty desegregation in an Alabama school system.

    a. The plan set a goal that each school in the district would have assigned to it approximately the same ratio of black and white teachers as existed in the school system as a whole.

    b. Schools with fewer than 12 teachers were exempted from the plan. (United States v. Montgomery County Board of Education, 395 U.S. 225, 1969.)

B. Employment and Dismissal

1. The Fifth Circuit Court of Appeals ruled that "objective and reasonable non-discriminatory standards" must be applied in cases of dismissal or demotion. (Singleton v. Jackson Municipal Separate School District, 419 F. 2d 1211, 5th Cir. 1970, cert. den. 396 U.S. 1032, 1970.)

2. The court further prescribed that no staff vacancy may be filled through "recruitment of a person of a race, color, or national origin different from that of the individual dismissed or demoted, until each displaced staff member who is qualified" has rejected an offer to fill the vacancy. (Singleton, supra.)

3. The Singleton criteria have been adopted by the Sixth Circuit to apply to school districts with an immediate past history of segregation, including all districts in Kentucky.

4. Racial discrimination in employment practices not related to desegregation is covered by Title VI of the Civil Rights Act of 1964 and is discussed in Unit Ten below.

SUPPLEMENT TO UNIT NINE

A CHRONOLOGY OF SCHOOL SEGREGATION/DESEGREGATION IN KENTUCKY

1855	Abolitionist John Fee founded a one-room school that would eventually become Berea College, the first Kentucky institution to provide integrated education.
1859	Berea was coerced into closing because of the antislavery ideas cultivated there.
1859-63	First proposals to integrate the Louisville City Schools were rejected.
1866	The Kentucky General Assembly passed several laws affecting blacks, including Chapter 636, relating to education.
1866	Berea resumed operation on a precollegiate level.
1869	Berea College admitted its freshman class and became the first desegregated institution of higher education in the South.
1874	The state's first public school system for blacks was established.
1886	Kentucky's first state-supported college for blacks (later known as Kentucky State University) opened in Frankfort.
1904	The Day Law was passed, making it illegal to educate blacks and whites in the same schools.
1906	The Lincoln Institute, supported by Berea College, was founded in Louisville as a private school for blacks.
1908	The Supreme Court of the United States upheld the use of the Day Law to prevent integration at Berea College.
1931	Louisville Municipal College was established as a public college for blacks.
1949	Louisville school teacher Lyman T. Johnson won a federal lawsuit against the University of Kentucky. As a result UK desegregated its graduate school. Johnson and several other blacks enrolled at UK. Several crosses were burned on campus in protest.
1950	The Day Law was amended to allow blacks and whites to attend the same colleges. Berea and the University of Louisville were opened to blacks.

1951 Louisville Municipal College was absorbed by the University of Louisville. One faculty member, Dr. C. H. Parrish, was employed by the University of Louisville, and became the first black professor at a desegregated institution in the South. The other 17 teachers left the profession or joined all-black faculties elsewhere.

1954 The Supreme Court declared school segregation unconstitutional. Kentucky Governor Wetherby asserted, "Kentucky will do whatever is necessary to comply with the law." UK opened undergraduate programs to blacks.

1955 First public school desegregation in Kentucky started in Lexington, Barbourville, Monticello, and Wayne County.

1956 School desegregation began in Louisville. Several formerly all-black schools joined as Kentucky High School Athletic Association. The Kentucky High School Athletic League disbanded after the 1957 state basketball tournament, won by Hopkinsville Attucks.

1957 Desegregation occurred in many Kentucky districts with only minor incidents. However, Governor Chandler had to call out the National Guard as mobs prevented black children from entering Clay Elementary School and Sturgis High School.

1958 Jeering, stone-throwing mob of white students and adults forced closing of desegregated Wheelwright High School.

1971 Jefferson County schools were ordered to desegregate.

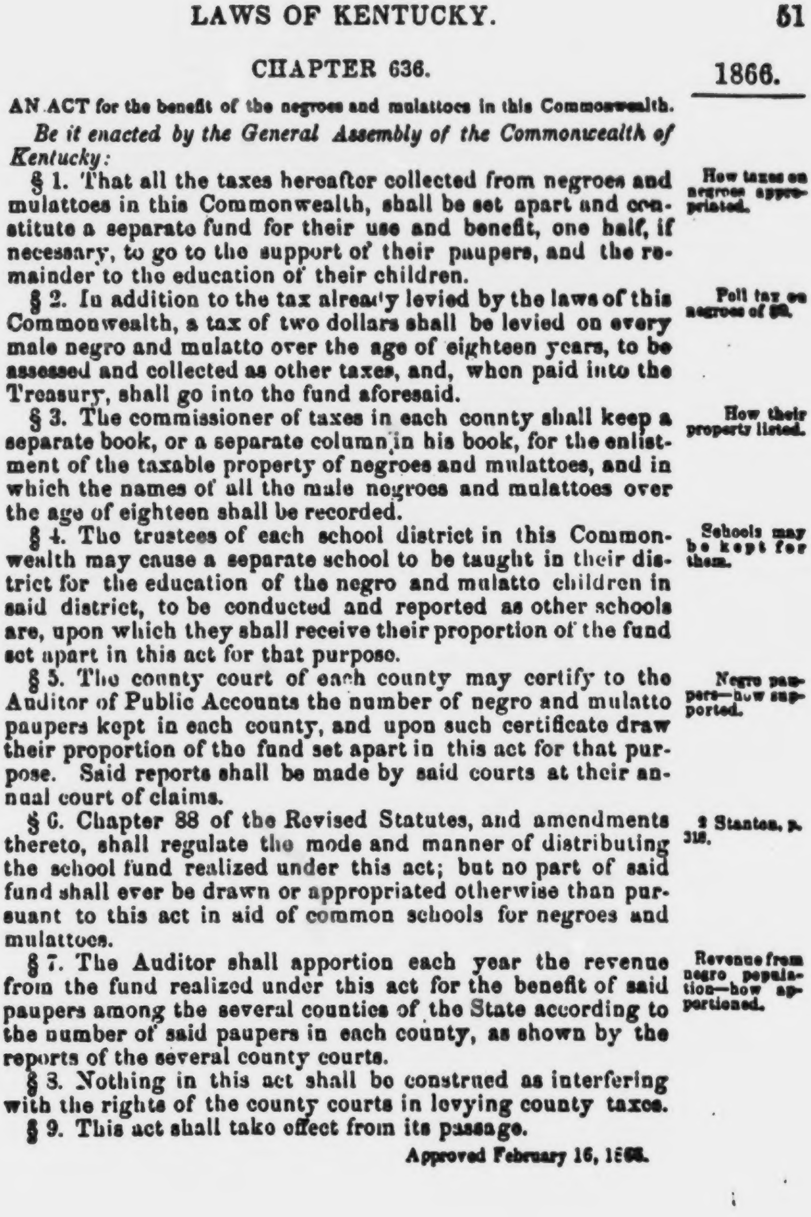
1972 Fayette County schools were ordered to step up desegregation efforts. Four previously all-black schools in Lexington-Carver, Booker T. Washington, Douglass, and Dunbar-were closed. Federal lawsuit was filed, requesting merger of Anchorage, Jefferson County, and Louisville systems.

1974 Federal courts ordered merger of Jefferson County and Louisville systems. The Supreme Court overturned order and remanded the case to Sixth Circuit for reconsideration. Meanwhile, the city school board requested merger under KRS 160.041.

1975 The Sixth Circuit Court of Appeals ordered busing of students in the new, enlarged Jefferson County Schools to achieve desegregation. Busing protests were widespread, changing drastically the national image of Louisville as a model of peaceful desegregation which had developed in the late 1950s.

1985 A Kentucky Commission on Human Rights report criticized Fayette County for having a high percentage of racially imbalanced schools. The report said that Jefferson County had done a far better job of integration and that Fayette County should scrap its desegregation plan and start over.

THE 1866 LAW ON EDUCATION OF BLACKS



CHAPTER 636.

1866.

AN ACT for the benefit of the negroes and mulattoes in this Commonwealth.

Be it enacted by the General Assembly of the Commonwealth of Kentucky:

How taxes on negroes appropriated.

§ 1. That all the taxes hereafter collected from negroes and mulattoes in this Commonwealth, shall be set apart and constitute a separate fund for their use and benefit, one half, if necessary, to go to the support of their paupers, and the remainder to the education of their children.

Poll tax on negroes of $2.

§ 2. In addition to the tax already levied by the laws of this Commonwealth, a tax of two dollars shall be levied on every male negro and mulatto over the age of eighteen years, to be assessed and collected as other taxes, and, when paid into the Treasury, shall go into the fund aforesaid.

How their property listed.

§ 3. The commissioner of taxes in each county shall keep a separate book, or a separate column in his book, for the enlistment of the taxable property of negroes and mulattoes, and in which the names of all the male negroes and mulattoes over the age of eighteen shall be recorded.

Schools may be kept for them.

§ 4. The trustees of each school district in this Commonwealth may cause a separate school to be taught in their district for the education of the negro and mulatto children in said district, to be conducted and reported as other schools are, upon which they shall receive their proportion of the fund set apart in this act for that purpose.

Negro paupers—how supported.

§ 5. The county court of each county may certify to the Auditor of Public Accounts the number of negro and mulatto paupers kept in each county, and upon such certificate draw their proportion of the fund set apart in this act for that purpose. Said reports shall be made by said courts at their annual court of claims.

2 Stanton, p. 318.

§ 6. Chapter 88 of the Revised Statutes, and amendments thereto, shall regulate the mode and manner of distributing the school fund realized under this act; but no part of said fund shall ever be drawn or appropriated otherwise than pursuant to this act in aid of common schools for negroes and mulattoes.

Revenue from negro population—how apportioned.

§ 7. The Auditor shall apportion each year the revenue from the fund realized under this act for the benefit of said paupers among the several counties of the State according to the number of said paupers in each county, as shown by the reports of the several county courts.

§ 8. Nothing in this act shall be construed as interfering with the rights of the county courts in levying county taxes.

§ 9. This act shall take effect from its passage.

Approved February 16, 1866.

THE DAY LAW (KRS 158.020)

AN ACT to prohibit white and colored persons from attending the same school.

Be it enacted by the General Assembly of the Commonwealth of Kentucky:

1. That it shall be unlawful for any person, corporation or association of persons to maintain or operate any college, school or institution where persons of the white and negro races are both received as pupils for instruction; and any person or corporation who shall operate or maintain any such college, school or institution shall be fined one thousand dollars, and any person or corporation who may be convicted of violating the provisions of this act, shall be fined one hundred dollars for each day they may operate said school, college or institution, after such conviction.

2. That any instructor who shall teach in any school, college or institution where members of said two races are received as pupils for instruction shall be guilty of operating and maintaining same and fined as provided in the first section hereof.

3. It shall be unlawful for any white person to attend any school or institution where negroes are received as pupils or receive instruction, and it shall be unlawful for any negro or colored person to attend any school or institution where white persons are received as pupils or receive instruction. Any person so offending shall be fined fifty dollars for each day he attends such institution or school: Provided, That the provisions of this law shall not apply to any penal institution or house of reform.

4. Nothing in this act shall be construed to prevent any private school, college or institution of learning from maintaining a separate and distinct branch thereof, in a different locality, not less than twenty-five miles distant, for the education exclusively of one race or color.

5. This act shall not take effect, or be in operation, before the fifteenth day of July, one thousand nine hundred and four.

Approved March 22, 1904

THE SEGREGATED TEXTBOOK LAW
(KRS 157.140)

No textbook issued under KRS 157.100 to 157.180 to a white school child shall ever be reissued to a colored school child, and no textbook issued to a colored school child shall ever be reissued to a white school child.

THE FIGURES TELL THE STORY

Current Expenditures per Pupil for White and Negro Children

The following table illustrates one aspect of the progress which the South has made in recent years to close the gap between white and Negro education. It also indicates the magnitude of the gap in white-Negro current expenditures which still remained in 1952.

Transportation costs are normally included in current expenditures, because they are part of the cost of operating a school system. However, they are *not* included in this table and in the following two tables, because they tend to distort comparisons of the quality of education. For example, high transportation costs do not necessarily mean better education. The figures for the South are estimates for the thirteen Southern states, since the data cover only nine states. The 1952 figures for North Carolina are for the school year 1950-51.

	1940		1952		Negro as % of White	
	White	Negro	White	Negro	1940	1952
South	$50.14	$21.54	$164.83	$115.08	43%	70%
Alabama	41.38	13.85	127.72	102.25	33	80
Arkansas	30.10	13.01	102.05	67.75	43	66
Florida	62.78	27.36	195.01	153.24	44	79
Georgia	46.70	14.61	163.76	110.59	31	68
Louisiana	63.59	20.33	n. a.	n. a.	32	—
Mississippi	41.71	7.24	117.43	35.27	17	30
N. Carolina	41.69	27.30	152.20	128.67	65	85
Oklahoma	59.10	62.81	n. a.	n. a.	106	—
S. Carolina	50.81	15.16	159.34	95.65	30	60

SOURCE: Compiled and derived from data gathered by SSCPEA from records and reports of state departments of education.
n.a.—not available

Capital Outlays per Pupil for White and Negro Schools

Another measure of the progress which the South has made in closing the white-Negro gap in education is the fact that capital outlays for Negro schools increased at far faster rate than outlays for white schools between 1940 and 1952. However, the gap was still substantial, dollarwise, in 1952. Because capital outlays fluctuate from year to year, comparisons among states and between years have certain limitations. However, the following table does provide an indication of the overall trend. The 1952 figures for North Carolina are for the school year 1950-51.

	1940		1952		Negro as % of White	
	White	Negro	White	Negro	1940	1952
Eight States	$4.37	$ .99	$36.25	$29.58	23	82
Alabama	6.68	.62	14.19	8.55	10	60
Arkansas	3.20	.70	5.48	3.24	22	59
Florida	6.39	.80	74.03	79.18	13	107
Georgia	2.14	.23	26.80	14.28	17	53
Mississippi	n. a.	n. a.	25.48	35.23	—	138
N. Carolina	6.04	1.84	59.10	54.90	30	93
Oklahoma	1.49	3.86	n. a.	n. a.	259	—
S. Carolina	6.25	.66	24.70	11.45	11	46

SOURCE: Compiled and derived from data gathered by SSCPEA staff from reports and records of state departments of education.
n.a.—not available

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Length of the School Year

Another measure of the progress which the South has been making in public education in recent years is the increasing length of the school year. Every one of the states covered in the following table which had a gap between the length of the white and Negro school years in 1940 had either completely closed it or significantly narrowed it by 1952. Moreover, in all but three states—two of which were already higher than the twelve-state median average—the length of the school year in white schools was increased.

	Average Number of Days in the School Year					
	1940		1950		1952	
	White	Negro	White	Negro	White	Negro
Median, 12 states	166	160	178	176	178	177
Alabama	157	147	176	177	176	176
Arkansas	163	144	175	169	172	171
Florida	169	164	180	180	180	180
Georgia	166[1]	157[1]	180	176	180	180
Kentucky[1]	158	170	171	176	172	178
Louisiana	180	144	180	171	179	174
Mississippi	160	124	160	141	167	158
N. Carolina	164	164	180	180	180[2]	180[2]
S. Carolina	175	147	180	174	180	178
Tennessee	166[1]	167[1]	176	176	176	176
Texas	174	162	175	175	175	175
Virginia	180	180	180	180	180	180

SOURCE: Compiled from data gathered by SSCPEA staff from records and reports of state departments of education. (Oklahoma figures not available.)

[1] Calculated by dividing aggregate days in attendance by average daily attendance, since state average was not available. All other figures are taken directly from annual reports or records in state departments of education.

[2] 1950-51 data.

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13. *Training of Classroom Teachers*

By 1952, the gap between the average number of years of college training received by white and Negro teachers in the South had been virtually closed. As a matter of fact, in four of the twelve reporting states (Kentucky data were not available) the Negro teachers averaged more years of college training than the white teachers, and in a fifth the averages were identical. The number of years of college training received by white teachers also increased in most of the reporting states.

	Average Years of College Training Received by Classroom Teachers					
	1940		1950		1952	
	White	Negro	White	Negro	White	Negro
Average for 12 Southern States	3.4	2.7	3.6	3.3	3.8	3.5
Alabama	3.2	2.1	3.3	3.0	4.1	3.4
Arkansas	2.4	2.0	[1]	[1]	3.4	3.1
Florida	[1]	[1]	4.0	3.8	4.2	4.0
Georgia	3.0	1.7	3.3	3.2	3.6	3.7
Louisiana	3.4	2.4	3.7	3.2	3.8	3.6
Mississippi	3.5	1.5	3.5	1.2	3.7	1.9
N. Carolina[2]	3.9	3.5	3.8	4.0	3.9[3]	4.1[3]
Oklahoma	3.7	3.6	3.9	4.0	4.1	4.1
S. Carolina	[1]	[1]	3.6	3.0	3.7	3.4
Tennessee	2.8	2.6	2.9	3.3	3.3	3.6
Texas	3.7	3.3	4.0	4.0	4.2	4.1
Virginia	3.4	3.1	3.3	3.6	3.4	3.7

SOURCE: Compiled by SSCPEA staff from reports and records of state departments of education.

[1] Not available.

[2] Supervisors, principals and classroom teachers.

[3] 1950-51 data.

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Salaries of Classroom Teachers

Since teachers' salaries are geared to the amount of college training they have received, the gap between the salaries of white and Negro teachers in the South has been closing at about the same pace as the gap between the relative amounts of training. (See Table 13.) In three of the twelve reporting states, the average salary of Negro teachers in 1952 was higher than that for white teachers, reflecting the fact that they had more training, and in a fourth state the salaries and relative amounts of training were about equal. In some states, however, the dollar gap was considerable. Except where noted, the figures are based on a directed sample of rural counties, and on all metropolitan counties in each state except Texas, where a directed sample was used.

	Average Annual Salaries of Classroom Teachers					
	1940		1952		1940	1952
	White	Negro	White	Negro	Negro as % of White	
12 Southern States	$ 894	$487	$2,740	$2,389	54%	87%
Alabama	848	402	2,541	2,359	47	93
Arkansas	626	368	1,929	1,524	59	79
Florida	1,116	577	3,195	2,922	52	91
Georgia	863	390	2,589	2,410	45	93
Louisiana	1,047	390	3,095	2,666	37	86
Mississippi	776[1]	232[1]	1,991	1,019	30	51
N. Carolina[2]	988	717	2,859[3]	2,935[3]	73	103
Oklahoma	998	971	2,978	2,985	97	100
S. Carolina	938	388	2,644	1,985	43	75
Tennessee	858	651	2,141	2,244	76	105
Texas	1,120	681	3,204	3,078	61	96
Virginia	987[1]	605[1]	2,512	2,577	61	103

SOURCE: Except as noted below, figures compiled by SSCPEA staff from reports and records of state departments of education.

[1] From *Biennial Survey of Education*. Includes supervisors, principals, and classroom teachers.

[2] Supervisors, principals, and classroom teachers.

[3] 1950-51 data.

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Number of Books in School Libraries

One of the gaps between white and Negro education in the South which has remained wide is the disparity between the number of books in the libraries of white and Negro schools. Although substantial progress had been made toward closing this gap by 1950, the number of books per pupil in the libraries of Negro schools in the five reporting states was considerably less than half of the figure for white schools.

	Number of Volumes in School Libraries per Pupil Enrolled		Per Cent Change
	1940	1950	1940-1950
Georgia			
White	3.0	4.8	+ 60%
Negro	0.5	1.5	+200
Total	2.1	3.7	+ 76
Louisiana			
White	3.2	5.4	+ 69
Negro	0.5	1.9	+280
Total	2.2	4.1	+ 86
North Carolina			
White	3.0	5.4	+ 47
Negro	1.2	2.4	+100
Total	2.4	4.5	+ 88
South Carolina			
White	2.3	3.0	+ 30
Negro	0.7	0.9	+ 29
Total	1.6	2.0	+ 25
Texas			
White	3.9	4.4	+ 13
Negro	0.9	2.1	+133
Total	3.4	4.0	+ 18
Total for 5 states			
White	3.3	4.7	+ 42
Negro	0.8	1.8	+125
Total	2.5	3.8	+ 52

SOURCE: Compiled from data gathered by SSCPEA staff from records of state departments of education.

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UNIT TEN

EQUAL OPPORTUNITY UNDER THE LAW

I. CONSTITUTIONAL AND LEGAL BASES

A. "Nor shall any state deny to any person within its jurisdiction the equal protection of the laws."

1. The equal protection clause is used to prevent discrimination against individuals based on their membership in an identifiable class. The 14th Amendment does not demand identical treatment of all classes. The courts have developed tests to determine when differential treatment is permissible.

2. Three Classifications

a. A compelling governmental objective must be demonstrated in order to provide differential treatment of persons when a fundamental interest is involved or a suspect classification is implicated. Such governmental action is subjected to a strict scrutiny by the courts and the burden of proof is on the government to justify its policies.

(1) A compelling objective is one that is absolutely indispensable to fulfilling a necessary governmental function.

(2) A fundamental interest is one mentioned in the Constitution or closely related to Constitutional guarantees by implication.

(3) A suspect classification is one based on immutable characteristics, where members of the class are stigmatized, where there has been a history of discrimination against the class, and/or the class is politically powerless.

b. Where neither a fundamental interest nor a suspect classification is involved, courts have allowed differential treatment of individuals, as long as the distinctions were reasonably related to legitimate governmental goals. The courts apply a rational basis test to such cases.

c. An intermediate standard has been developed for evaluating equal protection claims. Even though neither a fundamental interest nor a suspect classification is involved, if the interests affected are great enough the Court has voided classification schemes unless they are necessary to achieve legitimate goals and unless there is no reasonable less restrictive means of reaching the goals. In such cases the test is a balance among the character of the classification, the individual interests affected, and the governmental objectives asserted. (Dunn v. Blumstein, 405 U.S. 330, 1972.)*

*The above analysis is based on a discussion by Martha M. McCarthy and Nelda H. Cambron in Public School Law, Boston, Allyn and Bacon, 1981, pages 217-218.

B. Civil Rights Statutes

1. The Civil Rights Acts of 1866, 1870, and 1871 (42 U.S.C. 1981, 1983, 1985, and 1988) were enacted primarily to provide equal protection of the law to former slaves, although the rights of all persons are protected to some extent by these laws.

2. A series of statutes passed since 1963 have extended equal protection of the laws to many additional categories of persons.

   a. The Equal Pay Act of 1963 (29 U.S.C. 206d) prohibited sex discrimination in pay.

   b. Title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000) states that benefits under federally aided programs cannot be denied on basis of race, color, or national origin.

   c. Title VII of the same act outlaws, with some exceptions, discrimination in employment based on race, color, religion, sex, or national origin.

   d. The Age Discrimination in Employment Act of 1967 as amended in 1978, (29 U.S.C. 621) forbids discrimination based upon age except where there is a bonafide occupational qualification (BFOQ).

   e. Title IX of the Education Amendments of 1972 prohibits sex discrimination in programs that receive federal funds.

   f. Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794) and The Education of All Handicapped Children Act (P.L. 94-142) ban denial of equal opportunity to handicapped persons.

   g. The Pregnancy Discrimination Act of 1981 amended Title VII to exclude pregnancy in its coverage.

II. AREAS OF DISCRIMINATION

A. "Poor Districts"

1. The argument has been made that disparities in school expenditures among the districts of a state, when caused by differences in the amount of money collectable through local property taxation, is a violation of the Equal Protection Clause of the Fourteenth Amendment.

2. The Supreme Court of the United States rejected such an argument in upholding The Texas school finance scheme. (Rodriguez v. San Antonio Independent School District, 411 U.S. 1, 1973.)

   a. The Court held that the Texas system does not disadvantage any suspect class.

   b. The Texas school finance system does not interfere with a fundamental right of United States citizens.

   c. Strict scrutiny is not necessary and The Texas plan meets the rational basis test.

3. The Supreme Court of Kentucky has ruled that the Kentucky system of school finance violates the state constitution's provision (Section 183) that the general assembly "provide for an efficient system of common schools throughout the state." (Rose v. Council for Better Education, 88-SC-804-TG, 1989.)

B. Racial Discrimination

1. Race is a suspect classification. Therefore, racial classification can be used by government only when there is a compelling objective (such as to provide a remedy for past discriminations).

2. State-imposed racial segregation in the public schools is unconstitutional. (Brown v. Board of Education, 347 U.S. 483, 1954. See Unit Nine, above.)

3. Arabs, Jews and members of other ethnic groups can bring race discrimination charges under the 1866 Civil Rights Act because such groups were considered distinct races of the time the statute was enacted. (St. Francis College v. Al-Khazraji, 107 S. Ct. 2022, 1987, and Shaare Tefila Congregation v. Cobb, 107 S. Ct. 2019, 1987.)

4. Racial discrimination in employment is prohibited both by the Fourteenth Amendment and by Title VII.

    a. Proof of intent to discriminate is required to sustain a constitutional claim. (Washington v. Davis, 426 U.S. 229, 1976.)

    b. However, motivation of the employer is not relevant in Title VII cases; the effects test is used. Disparate impact on a protected class is sufficient to sustain a prima facie case of employment discrimination. (Griggs v. Duke Power Company, 401 U.S. 424, 1971.)

    c. The courts have upheld the use by South Carolina of the National Teacher Examination as a certification cut-off, despite the fact that blacks as a group did not score as high as whites. (United States v. South Carolina, 445 F. Supp. 1094, D.S.C. 1977, Aff. 434 U.S. 1026, 1978.)

    d. The Supreme Court has held that the burden of proof in a Title VII case is on the plaintiff to show the presence of the following five elements:

        (1) membership in a protected class;

        (2) application for the position;

        (3) qualification for the position;

(4) rejection;

(5) action by the employer in continuing to seek applicants with the same qualifications.

If these five elements are shown, a prima facie case is established. The employer then must show a legitimate, nondiscriminatory reason for the employee's rejection. (McDonnell Douglas Corp. v. Green, 411 U.S. 792, 1973.)

e. Gross statistical disparities among groups of workers may also be used to establish a pattern of discrimination. (International Brotherhood of Teamsters v. United States, 431 U.S. 324, 1977.)

f. In order to determine if a pattern of discrimination exists in teacher employment, the proper comparison is that of the composition of the defendant district's teaching staff with the racial composition of the qualified public school teacher population in the area from which the district might reasonably recruit teachers. (Hazelwood School District v. United States, 433 U.S. 299, 1977.)

5. Affirmative action plans are discussed in a separate section, below.

C. Sex Discrimination

1. Sex is not considered a suspect classification in equal protection cases, but falls in the intermediate category.

2. To withstand constitutional challenge, classification by sex must serve important governmental objectives and must be substantially related to achievement of those objectives. (Craig v. Boren, 429 U.S. 190, 1976.)

3. The legality of schools segregated by sex is questionable.

a. In a 4-4 tie vote the Supreme Court upheld a Third Circuit opinion that a single-sex high school does not violate the Equal Protection Clause. (Vorchheimer v. School District of Philadelphia, 430 U.S. 703, 1977.)

   b. If separate schools exist, they must be equal in quality and have non-discriminatory admission policies. (Berkelman v. San Francisco Unified School District, 501 F.2d 1264, 9th Cir. 1974.)

   c. The Fifth Circuit Court of Appeals struck down an arrangement whereby an entire school district was sex-segregated as part of a racial desegregation plan. (United States v. Hinds County, 560 F. 2d 619, 5th Cir. 1977.)

   d. The Supreme Court ruled in 1982 that Mississippi University for Women violated the Equal Protection Clause in refusing to admit a man to its nursing school. (Mississippi University for Women v. Hogan, 458 U.S. 718, 1982.)

   e. Following the M.U.W. decision above a Philadelphia judge ruled that the all-male admissions policy of a Philadelphia school violated the Fourteenth Amendment. (Estate of Stephen Girard, *School Law News*, Sept. 10, 1982.)

4. Sex discrimination laws extend beyond the principle of equal pay for equal work.

   a. The courts have not yet made a definitive ruling on the "comparable worth" theory.

   b. Title VII permits women in traditionally female-dominated jobs to sue for salary discrimination, when salary differences between different jobs can be traced to intentional sex bias. (County of Washington v. Gunther, 452 U.S. 161, 1981.)

   c. Title VII prohibits public agencies from requiring women to pay more than men into retirement systems. (City of Los Angeles, Dept. of Water and Power v. Manhart, 435 U.S. 702, 1978.)

5. Sex discrimination in job applications and in promotions is illegal.

   a. Title VII requires that women with children be treated like men with children in job applications. (Phillips v. Martin Marietta Corp. 400 U.S. 542, 1971.)

   b. The employer need not prove that it had no discriminatory motive in hiring or promoting; it needs only to "articulate some legitimate nondiscriminatory reason" for its actions. (Board of Trustees v. Sweeney, 439 U.S. 24, 1979.)

   c. Veteran's preference in employment is not gender-based, if the intent is to give preference to veterans of either sex over nonveterans of either sex. Evidence of discriminatory impact is not evidence of discriminatory intent. (Personnel Administrator v. Feeney, 442 U.S. 256, 1979.)

6. Persons claiming to be discriminated against have a right to sue in federal courts under these conditions:

   a. They are a member of a class protected by federal law;

   b. Congress intended to create a right to sue;

   c. The suit is consistent with the statute's purposes; and

   d. The cause of action is not usually handled under state law. (Cort v. Ash, 422 U.S. 66, 1975.)

7. Title IX of the Education Amendments of 1972 (20 U.S.C. Sec. 1681) prohibits sex discrimination in educational programs and activities receiving federal financial aid.

   a. Title IX regulations prohibit most sex-segregated classes, sex discrimination in counseling, and sex-based differential graduation requirements.

   b. Title IX applies to employees as well as students, for the statute says "no person" may be discriminated against on the basis of gender. (North Haven Board of Education v. Bell, 456 U.S. 512, 1982.)

   c. Further discussion of Title IX is provided in Unit Eleven, below.

8. Sexual Harrassment

   a. Title VII guidelines indicate that sexual harrassment refers to unwelcome sexual advances when:

      (1) submission to such conduct is made a condition of one's employment;

      (2) submission to such conduct is a basis for employment decisions; or

      (3) such conduct substantially interferes with one's work performance or creates an offensive work environment.

   b. Minor students are legally incapable of consenting to such activities, so sexual advances to students need not be unwelcome to be illegal.

   c. Employers are liable for the actions of supervising personnel when the employer knows or should know of the supervisor's behavior. (Meritor Savings Bank v. Vinson, 106 S.Ct. 2399, 1986.)

D. Pregnancy, Maternity, and Marital Status

1. Disability Benefits

   a. In 1974 the Supreme Court ruled that the Equal Protection Clause of the Fourteenth Amendment does not require employers to pay for pregnancy leave. (Geduldig v. Aiello, 417 U.S. 484, 1974.)

   b. In 1974 the Supreme Court held that an employer's refusal to grant disability benefits for pregnancy was not gender-related but condition-related and not a violation of Title VII. (General Electric v. Gilbert, 429 U.S. 1079, 1976.)

   c. In 1978 Congress passed the Pregnancy Discrimination Act (PDA) as an amendment to Title VII, prohibiting discrimination in employment on the basis of pregnancy, childbirth, or related medical conditions. PDA applies to all aspects of employment - hiring, reinstatement, termination, disability benefits, sick leave, medical benefits, seniority, and other conditions of employment.

2. Maternity Leave

   a. Teachers cannot be required to take a maternity leave at some arbitrary point, such as the fourth or fifth month of pregnancy. Such a policy violates the Due Process Clause of the Fourteenth Amendment.

   b. A return to work policy that specified any number of months after childbirth before the teacher can return to work is an arbitrary violation of the Due Process Clause. (Cleveland Board of Education v. LaFleur and Cohen v. Chesterfield County School Board 414 U.S. 632, 1974.)

   c. However, the Supreme Court of New Jersey has upheld a "presumptive period of disability of four weeks before expected birth and four weeks following the actual date of birth. Hynes v. Board of Education, 461 A. 2d 1184, N.J., 1983.)

   d. The Supreme Court of the United States upheld a California state law requiring employers to give pregnant workers unpaid disability leave and reinstatement in their jobs. (California Federal Savings and Loan v. Guerra, 107 S. Ct. 683, 1987.)

   e. The Court also upheld a Missouri law which required persons returning from leave to be reinstated only if a position were available. (Wimberly v. Missouri, 107 S. Ct. 821, 1987.)

   f. Not only marriage but also divorce is a liberty interest protected by the Fourteenth Amendment. (Littlejohn v. Rose, 768 F.2d, 6th Cir., 1985.)

   g. A school can interfere with the right of a teacher to breastfeed her child at school only when it is clearly necessary to do so. (Dike v. School Board, 650 F.2d 783, 5th Cir., 1981.)

   h. The Fifth Circuit Court of Appeals has ruled unconstitutional a Mississippi law automatically disqualifying school employees who were parents of illegitimate children. (Andrews v. Drew Municipal Separate School District, 507 F2.d 611, 5th Cir., 1975.)

3. Married Students and Unwed Mothers

    a. Married students and/or unwed mothers are not generally excluded from attendance solely for reason that they are married. However, if the presence of a married student causes disciplinary problems or is judged to affect adversely the welfare of other students, school officials may deny admission.

    b. A U.S. District Court in Georgia has ruled that a school district could require a married student or a student/parent to attend a fully accreditated evening program, but fees for books and/or tuition could not be charged. (Houston v. Prosser, N.D. Ga., 1973.)

    c. The Kentucky Court of Appeals held that a school board resolution providing that any student who married must withdraw immediately from school and could not reenter for one full year, and then only as a special student with permission of the principal, was arbitrary and therefore void (Board of Education of Harrodsburg v. Bentley, 383 S.W. 2d 677, 1964.)

    d. Earlier cases tended to uphold exclusion of married students from extracurricular activities, but the current trend is against them. (See Kissack v. Garland Independent School District, 330 S.W.2d 708, Tex. 1959 and Davis v. Meek, 344 F. Supp. 298 N.D. Ohio, 1972, for examples.)

E. Age Discrimination

1. Age is not a suspect classification under the Fourteenth Amendment.

2. Age limits for school admission, for compulsory attendance, for free public education, and for participation in athletics are almost invariably upheld.

3. The Age Discrimination in Employment Act (42 U.S.C.A. Sec. 6101) has no direct effect on elementary or secondary school pupils, but relates to teachers and other employees.

a. The act prohibits age discrimination in employment and applies to individuals who are at least 40 years of age.

b. A "business necessity" provision exempts certain occupations, such as state police and airline pilots, from the act.

c. The constitutionality of the act as it applies to state employees has been upheld by the Supreme Court. (E.E.O.C. v. Wyoming, 460 U.S. 226, 1983.)

d. Financial considerations cannot be used as a basis for not employing older teachers in favor of less experienced teachers who would be lower on salary schedules. (Geller v. Markham, 635 F.2d 1027, 2d Cir., 1980.)

e. The former practice of forcing teachers to retire at 65 is now illegal.

F. Discrimination Against the Handicapped
(This is treated in a separate unit.)

G. Discrimination on Basis of Nationality

1. The Due Process and Equal Protection Clauses of the Fourteenth Amendment apply to all persons, not just to citizens.

2. School districts cannot refuse admission to nor charge tuition to children of aliens, whether or not they are legally admitted to the United States. (Plyler v. Doe, 457 U.S. 202, 1982.)

3. School districts need not provide tuition-free admission to Mexican children sent to Texas for the primary purpose of attending free public schools while their parents remained in Mexico. The same would apply to any minors living apart from their parents or guardians, whether U.S. citizens or not. (Martinez v. Bynum, 461 U.S. 321, 1983.)

4. Because of the important government role of public school teachers in preparing students for participation as citizens, the Supreme Court of the United States upheld a New York law requiring citizenship or progress toward such for certification. (Ambach v. Norwick, 441 U.S. 68, 1979.)

5. A New York law excluding aliens from state financial aid for higher education was held unconstitutional under the Equal Protection Clause. (Nyquist v. Mauclet, 97 S.Ct. 2120, 1977.)

6. Non-English-speaking students must be given special treatment, such as bilingual education. (Lau v. Nichols, 414 U.S. 563, 1974.)

7. Compensatory instruction is required for children who are deficient in standard English because they speak "black English." (Martin Luther King Elementary School v. Michigan Board of Education, 473 F. Supp. 1371, E.D. Mich. 1979.)

III. AFFIRMATIVE ACTION/REVERSE DISCRIMINATION

A. Admissions, Hiring, Promotion

1. Where blacks could prove previous discrimination, newly employed blacks must be given retroactive seniority to date when initial suit charging discrimination was filed or to the passage of the Civil Rights Act of 1965. (Franks v. Bowman Transportation, 424 U.S. 747, 1976, and International Brotherhood of Teamsters v. United States, 425 U.S. 990, 1977.)

2. Title VII prohibits discrimination against any race, including whites. (McDonald v. Santa Fe Trail Transportation, 423 U.S. 923, 1976.)

3. Consideration of race in admissions when the purpose is to redress past discrimination is permitted, but race cannot be made the sole criterion in admissions in a case involving a public institution with no history of de jure segregation or other discrimination. (Regents of the University of California v. Bakke, 438 U.S. 265, 1978.)

4. Affirmative action plans relating to promotions have caused much litigation.

    a. The Supreme Court of the United States upheld a plan voluntarily adopted by a union and an employer as a temporary measure to increase the number of blacks in skilled positions in a company that had previously discriminated against blacks. (United Steelworkers v. Weber and Kaiser Aluminum v. Weber, 443 U.S. 193, 1979.)

b. The Court upheld voluntary agreement that provided for race-conscious promotions on a city firefighting force even though the workers benefited had not individually been victims of discrimination. (Local 93 v. Cleveland 106 S.Ct. 3063, 1986.)

c. The Court on the same date said that court-ordered race-conscious goals have more limits than voluntary action but are acceptable when bias has been pervasive. (Local 28 v. E.E.O.C. 106 S.Ct. 3019, 1986.)

d. The Court upheld a one black for one white promotion plan for Alabama state troopers as an interim measure to offset past discriminatory hiring practices. (United States v. Paradise, 107 S. Ct. 1053, 1987.)

e. In an important sex discrimination the Court said a government agency was justified in promoting a qualified woman over a man whose promotion interview score was slightly higher into a job no woman had ever filled at the agency. (Johnson v. Transportation Agency, 107 S. Ct. 1442, 1987.)

B. Reduction in Force Plans have also caused considerable litigation.

1. In 1984 the Supreme Court held that a district court erred in vacating a bona fide seniority plan for layoffs and requiring that more senior white employees be laid off instead of more recently employed blacks who themselves had not been the direct victims of discriminatory hiring practices. (Firefighters Local Union v. Stotts, 467 U.S. 561, 1984.)

2. However, when it was shown that a school system had engaged in past segregation, the courts upheld a "percentage layoff" plan. (Arthur v. Nyquist, 712 F. 2d 816, 2d Cir. 1983, Cert. Den. 104 S.Ct. 3555, 1984.)

3. In 1986 the Supreme Court ruled that a contract under which some white public school teachers were laid off before blacks with less seniority violates the Constitution, but that some race-conscious layoff plans may be permissible. (Wygant v. Jackson Board of Education, 106 S.Ct. 1842, 1986.)

IV. LIABILITY FOR VIOLATIONS OF CIVIL RIGHTS

A. School Officials

1. 42 U.S.C. 1983 permits the assessment of damages against school officials who deprive a person of any rights, privileges, or immunities secured by the Constitution.

2. Principals, superintendents, and board members are personally liable. Since teachers also serve as school officials, they too may be liable.

3. Among those parties who can bring suit against school officials are:

    a. Students, for being suspended without due process of law. (Carey v. Piphus, 435 U.S. 247, 1978.)

    b. Parents, for being deprived of their son who committed suicide at school. (Kelson v. City of Springfield, 767 F.2d 651, 9th Cir., 1985.)

    c. Teachers, for being evaluated unfairly. (Burnaman v. Bay City Independent School District, 445 F. Supp. 927, S.D. Tex. 1978.)

4. Courts can award three kinds of damages.

    a. Compensatory damages are awarded to compensate injured persons for their actual losses - medical expenses, lost salary, court costs, and other expenses.

    b. Exemplary or punitive damages can be awarded where defendants have shown malice, fraud, or reckless disregard for an injured person's rights.

    c. Nominal damages are a small, symbolic award (for example, one dollar awarded where a person has been wronged but has not been able to show actual damages.*

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*The above discussion owes much to Louis Fischer, David Schimmel and Cynthia Kelly, Teachers And The Law, 2nd ed. New York: Longman, 1987.

B. School Board Members

1. School board members can be held liable "if they knew or reasonably should have known that the action they took within their sphere of official responsibility would violate someone's constitutional rights."

2. A board member's immunity from liability for money damages under section 1983 depends on two elements of "good faith."

    a. The subjective element for good faith immunity requires that the official act in a sincere belief that he is doing right and without a malicious intent to deprive a person of a right.

    b. The objective element causes the official to lose his immunity if he acts out of ignorance or in disregard to "clearly established constitutional rights" or "settled, indisputable law." (Wood v. Strickland, 420 U.S. 308, 1975.)

C. School Districts (Or The Board as an Entity)

1. Since 1978 local governing boards under certain circumstances can be sued under Section 1983 and required to pay damages for violating someone's civil rights.

    a. A school district may be liable if the violation is caused by the board's official policy or custom.

    b. A district is not liable for violations of rights by the independent wrongful acts of its employees. (Monell v. Department of Social Services 436 U.S. 658, 1978.)

2. Local governing units are not entitled to qualified good-faith immunity. (Owen v. City of Independence, 445 U.S. 622, 1980.)

3. Section 1983 authorizes a person whose rights under a federal statute have been violated to sue for the deprivation of any rights "secured by the Constitution of the United States or by any act of Congress providing for equal rights." (Maine v. Thiboutot, 448 U.S. 1, 1980.)

SUPPLEMENT TO UNIT TEN

PRINCIPAL FEDERAL LAWS AFFECTING EQUAL OPPORTUNITY IN SCHOOLS

EARLY POST-CIVIL WAR STATUTES

Acts of 1866, 1870, 42 U.S.C., sec. 1981 (the right to make contracts regardless of race)

Acts of 1871, 42 U.S.C., sec. 1983 (protects against deprivation of any constitutional right by officials or anyone acting under color of law)

Acts of 1871, 42 U.S.C., sec. 1985 and 1986 (protects against conspiracy to deprive people of their constitutional rights)

MODERN STATUTES

Civil Rights Act of 1964, 42 U.S.C., sec. 2000, Title VI (general prohibition--sec. 2000 (d); Title VII (employment discrimination--sec. 2000 (e))

Education Amendments of 1972 (Title IX), 20 U.S.C., sec. 1681 (discrimination in education programs)

Equal Pay Act of 1963, 29 U.S.C., sec. 206(d) (sex discrimination in pay)

Age Discrimination in Employment Act of 1967, as amended 1986, 29 U.S.C., sec. 623

Equal Educational Opportunities Act of 1974, 20 U.S.C., sec. 1703

Rehabilitation Act of 1973, 29 U.S.C., sec. 794 (prohibiting discrimination against the handicapped)

Education of the Handicapped Act, 20 U.S.C., sec. 1400 (federal funds to provide educational opportunities for the handicapped)

Bilingual Education Act, 20 U.S.C., sec. 3221 (providing for bilingual education programs)

Pregnancy Discrimination Act, 1981 amendment to Title VII of the Civil Rights Act of 1964, 42 U.S.C., sec. 2000e(K). (prohibits discrimination against pregnant persons)

Stewart B. McKinney Homeless Assistance Act, 42 U.S.C., sec. 11431. (provides for educational placement of and services to homeless children)

Civil Rights Restoration Act of 1988, P.L. 100-259.

Major Civil Rights Laws Affecting Schools

Overview of Major Federal Civil Rights Statutes Related to Elementary and Secondary Schools

Statute	Groups Protected	Interests Protected	Schools Covered	Schools Exempted
Sec. 1981, 1982; acts of 1866, 1870	Race	Right to make contracts	Public and private if they solicit clients	Not settled
Sec. 1983; act of 1871	All groups; general civil rights	Constitutional rights	Public and private if they operate "under color of law"	Schools not acting "under color of law"
Sec. 1985 (3) (Conspiracy)	All groups; general civil rights	Equal protection of law	Any conspiracy by any persons	Not applicable
Sec. 1988; acts of 1866, as amended	All groups	Federal court proceedings if civil rights are violated	According to the law violated	Not applicable
Equal Pay Act	Sex	Salaries and wages	All who are subject to the Fair Labor Standards Act	← See
Civil Rights Act of 1964, Title VI	Race, color, or national origin	All benefits under federally aided programs	All, in federally supported activities	← See
Civil Rights Act of 1964, Title VII	Race, color, national origin, religion, sex	Employment benefits	All with 15 or more employees	Religious schools for religion-related sex preference
Education Amendments of 1972, Title IX	Sex	Educational benefits that are federally supported	All, in federally supported activities	Religious schools for religion-related sex preference
Family Rights and Privacy Act of 1974	All students	Access to records & confidentiality of records	All, in federally supported activities	← See
Rehabilitation Act of 1963 (sec. 504)	All handicapped persons	All benefits under federally aided programs	All, in federally supported activities	None
Education of all Handicapped Children Act of 1975	All handicapped children	Educational benefits under federally aided programs	All, in federally supported activities	None
Bilingual Education Act	All children of limited-English-speaking proficiency	Educational benefits under federally supported programs	All, in federally supported activities	None
Equal Access Act of 1984	All students	Equal access for student groups to conduct extracurricular meetings on school premises	Public secondary schools receiving federal funds	← See

A. 42 U.S.C. § 1981—Civil Rights Acts of 1866, 1870

Section 1981 provides:
"All persons within the jurisdiction of the United States shall have the same right . . . to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishments, pains, penalties, taxes, licenses, and exactions of every kind, and to no other."

B. 42 U.S.C. § 1983—The Civil Rights Act of 1871

Section 1983 provides:
"Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

C. 42 U.S.C. §§ 1985 and 1986—The Civil Rights Act of 1871

Section 1985(3) provides:
"If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws: or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws . . . : in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators."

Section 1986 provides:
"Every person who, having knowledge that any of the wrongs conspired to be done, and mentioned in Section 1985 of this title, are about to be committed, and having the power to prevent or aid in preventing the commission of the same, neglects or refuses so to do, if such wrongful act be committed, shall be liable to the party injured, or his legal representatives, for all damages caused by such wrongful act, which such person by reasonable diligence could have prevented; and such damages may be recovered in an action on the case; and any number of persons guilty of such wrongful neglect or refusal may be joined as defendants in the action. . . ."

D. 42 U.S.C. § 1988—Civil Rights Acts of 1866, 1870

As amended 1976, § 1988 provides:

Proceedings in vindication of civil rights. The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this chapter and Title 18, for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of

the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty. In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or in any civil action or proceeding, by or on behalf of the United States of America, to enforce, or charging a violation of, a provision of the United States Internal Revenue Code, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.
As amended Pub.L. 94-559, § 2, Oct. 19, 1976, 90 Stat. 2641.

E. 42 U.S.C. § 2000(d)—Civil Rights Act of 1964, Title VI

Section 601 of Title VI provides:
"No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."

F. 42 U.S.C. § 2000(e) Civil Rights Act of 1964, Title VII

Section 702 of Title VII provides:
"This title shall not apply to . . . a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities."

Section 703(a) provides in part that:
"It shall be an unlawful employment practice for an employer—(1) . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or (2) to limit, segregate, or classify his employees . . . in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin."

Section 703(e) provides:
"Notwithstanding any other provision of this [title], (1) it shall not be an unlawful employment practice for an employer to hire and employ employees, for an employment agency to classify or refer for employment any individual, for a labor organization to classify its membership or to classify or refer for employment any individual, or for an employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining programs to admit or employ any individual in any such program, on the basis of his religion, sex, or national origin *in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise. . . .* " (Emphasis supplied.)

Section 703(h) reads in relevant part:
"Notwithstanding any other provision of this title, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment *pursuant to a bona fide seniority or merit system*, . . . provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin. . . ." (Emphasis supplied.)

G. 20 U.S.C. § 1681—Education Amendments of 1972, Title IX

Section 901 of Title IX provides in part:

SEC. 901. (A) No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance, except that:

(1) in regard to admissions to educational institutions, this section shall apply only to institutions of vocational education, professional education, and graduate higher education, and to public institutions of undergraduate higher education. . . .

(3) this section shall not apply to an educational institution which is controlled by a religious organization if the application of this subsection would not be consistent with the religious tenets of such organization. . . .

(5) in regard to admissions this section shall not apply to any public institution of undergraduate higher education which is an institution that traditionally and continually from its establishment has had a policy of admitting only students of one sex.

H. 29 U.S.C. § 206(d)—Equal Pay Act

§ 206 provides:
"No employer having employees subject to [the minimum wage provisions of the FLSA] shall discriminate, within any establishment . . . , between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions. . . ."

The Act nevertheless permits differences in wages if paid pursuant to:
"(i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any factor other than sex. . . ."

I. 29 U.S.C. § 621—Age Discrimination Act (§ 623)

(a) It shall be unlawful for an employer—

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age. . . .

(c) It shall be unlawful for a labor organization—

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his age. . . .

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section. . . .

(f) It shall not be unlawful for an employer, employment agency, or labor organization—

(1) to take any action otherwise prohibited under subsections (a), (b), (c), or (e) of this section where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age. . . .

(3) to discharge or otherwise discipline an individual for good cause. . . .

J. 20 U.S.C. § 1703—Equal Education Opportunities Act

§ 1703 provides:
No State shall deny equal educational opportunity to an individual on account of his or her race, color, sex, or national origin, by—

(a) the deliberate segregation by an educational agency of students on the basis of race, color, or national origin among or within schools. . . .

(c) the assignment by an educational agency of a student to a school, other than the one closest to his or her place of residence within the school district in which he or she resides, if the assignment results in a greater degree of segregation of students on the basis of race, color, sex, or national origin. . . .

(d) discrimination by an educational agency on the basis of race, color, or national origin in the employment, employment conditions, or assignment to schools of its faculty or staff, except to fulfill the purposes of subsection (f) below. . . .

(e) the transfer by an educational agency, whether voluntary or otherwise, of a student from one school to another if the purpose and effect of such transfer is to increase segregation of students on the basis of race, color, or national origin among the schools of such agency; or

(f) the failure by an educational agency to take appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs.

K. 29 U.S.C. § 794—Rehabilitation Act of 1973 (§ 504)

The Act provides in part:
"No otherwise qualified handicapped individual . . . shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."

CASES

In each of the following cases a teacher alleged discrimination in a personnel decision. For each case discuss:

(a) The constitutional or statutory basis for the suit;

(b) The principal arguments on each side;

(c) The decision the court would reach and the reasons for it;

(d) The award, if any, made to the teacher.

Be sure to follow the rules related to burden of proof, prima facie cases, etc.

1. Geller

After having taught for 11 years in New Jersey, Miriam Geller moved with her husband to Connecticut. Soon she obtained employment as a substitute teacher. Over Labor Day weekend in 1976, Geller was offered a vacant art teacher's position by Dr. Leonard Johnson, Principal of the Bugbee School in West Hartford. He praised her work as a substitute, gave her the school keys to prepare the art room over the holiday, and asked her to start the following Tuesday, subject to the "routine approval" of the district personnel director, Richard Hedrick.

Hedrick cited the school board's cost-cutting policy of hiring no one with more than 6 years' experience and told Geller her 11 years made her too expensive. She continued teaching as a full-time substitute for two weeks while other applicants were considered. At the end of that time Hedrick informed Geller that a 26-year-old woman with two years' experience was going to be hired. The 55-year-old Geller was out of a job. She was not fired; she had never really been hired for the position.

2. Danzl

In late July 1979, a vacancy arose for a high school principalship in the North St. Paul school district for the 1979-80 school year. Twelve individuals-ten male and two female-applied for the position. Director of Secondary Education Richard St. Germain selected four finalists-two male and two female-based upon his review of the papers submitted, phone conversations with the applicants and reference checks. Several male applicants with prior principal experience were eliminated by this process. St. Germain interviewed the four finalists.

On August 21, a committee of male and female teachers from the high school interviewed the candidates. Following the interviews, the teachers discussed and rated the candidates, and then met with St. Germain. The teachers agreed that Agnes Danzl, a female, and Jack Edling, a male, were the two leading candidates, but favored Danzl slightly based on the interviews. St. Germain told the teachers committee that he favored Edling; he had contacted various persons regarding Edling, including both administrators and teachers, and the references were very positive. His two reference checks on Danzl, he said, were not as positive. St. Germain had contacted an administrator who knew both candidates and he stated that he would hire Edling over Danzl. Also, one of Danzl's supervisors had stated that he would hesitate to hire Danzl for a high school as large as Burnsville, where she was currently teaching. The teachers, concerned that only administrators had been contacted for Danzl, while both administrators and teachers had been contacted for Edling, asked for time to conduct their own investigation of Danzl. St. Germain was amenable to this procedure.

Three male and female committee members, independent of St. Germain and of one another, contacted three teachers at Burnsville. Each of the references was considered, on balance, unfavorable to Danzl and was similar in content. The references indicated that Danzl was inflexible, had certain staff relations problems, and was insensitive to student needs. After the teachers informed the other committee members of the reference checks, St. Germain polled each member of the committee by phone. Their unanimous choice for the interim principal position was Edling. St. Germain cross-checked the references from the teachers with a Burnsville administrator, who did not disagree, in general, with the unfavorable comments about Danzl. Edling was recommended to the school board, which in turn appointed him to the principal position.

3. Palmer

Lois Palmer had been a teacher since 1943 and had been employed by the Copiague Union Free District #5 (New York) as a kindergarten teacher since the 1961-62 school year. She received tenure at the end of the 1963-64 school year. In February 1975, she reached the age of 70. On May 15, 1975, she met with Paul Buscemi, the Copiague superintendent of schools. He informed her that she was to be retired at the end of the school year because she had reached the retirement age of 70. This decision was subsequently ratified by the Copiague school board, and the New York State Retirement System was directed to place Mrs. Palmer on retirement status as of August 25, 1975.

It was not disputed that Palmer was willing and able to teach. Her performance as a teacher was rated satisfactory in each year of her employment. In the last evaluation, made just before she was retired in 1975, her principal recommended that she be rehired, "subject to review of compulsory retirement under New York State Education Law."

4. Norcross

Rebecca Norcross was born with a congenital visual impairment which renders her legally blind. Vision in her right eye can be corrected to 20/200 visual acuity. The vision in her left eye is unmeasurable, and what little vision there is in this eye is of a nature which causes double vision and distortion of the corrected vision in the right eye. She has no night vision at all.

She has been certified "legally blind" by her ophthamologist and by the federal government for purposes of receiving federal benefits accorded to blind persons. She is capable of reading some print, however, and received a B.S. degree in library science from Sam Houston State University, Huntsville, Texas, in January, 1966, notwithstanding her disability.

After her graduation, she was employed for three years as assistant librarian at F.M. Black Junior High School in Houston, Texas. Because of pregnancy and family commitments, she quit her employment at F.M. Black Junior High School in January, 1969.

From 1969 to 1978, Norcross remained outside of the work force. She again sought employment in June, 1978, at which time she inquired as to employment opportunities at the Flippin (Arkansas) school system. At the time she made this initial inquiry, she resided in Houston, Texas. Norcross met with the personnel administrator, Wallace Sneed, in early June of 1978. At the meeting Norcross described her education and experience in the field of library science, and advised Sneed that she was legally blind. Sneed asked her to read aloud from a letter from his desk and she did so. At the time of this initial meeting, there were no positions available with the Flippin system, Norcross was a citizen and resident of Texas, and was not certified in the state of Arkansas. Sneed told Norcross she could fill out an application form and further advised her that she would need to obtain certification in Arkansas.

In January, 1979, she was certified by the Arkansas Department of Education as Librarian, K-12 (Kindergarten through Grade 12), and soon thereafter again contacted Sneed by telephone, informing Sneed of her certification and her further interest in a position as librarian if one became available. She testified that Sneed replied that if such a position became available, he would hire the most qualified applicant.

In July, 1979, Norcross submitted another application requesting consideration for any available position. She was employed for 1979-80 as a kindergarten aide and instructed small groups under supervision. She received no criticism of her performance, although there was a controversy concerning her responsibility for playground duties. Her supervisor, Meg Hanna, counseled her as to methods of better instructing the students. The controversy arose from resentment from other teachers of her failure to perform playground duties during her first semester as an aide.

During this first year, the school principal received some reports that Norcross was cross and irritable on occasion with the children. She was not re-employed as a teacher's aide for the following year because of a cutback in federal funding.

Near the end of the 1979-80 school year, she learned that the high school librarian, Geneva Hurst, had decided not to return in the 1980-81 year. She called Sneed's office in May, 1980, to confirm that her applications were still on file.

On June 2, 1980, she visited Sneed at his office to reiterate her interest in the library position. At that meeting Sneed told her that he would not recommend her for the job as librarian. She contends that Sneed also said that he would refuse to recommend her because of her visual handicap. Sneed testified that he told her that he would not recommend her to the board because of problems she encountered as a teacher's aide: crossness, supervision, discipline and problems with playground duty. Norcross testified that Sneed further told her that he would not submit her application for consideration. Sneed denied having made any such statement.

After Sneed learned of Hurst's intention not to return as librarian in the 1980-81 school year, Sneed was advised by the Superintendent of Schools in Eureka Springs, at a superintendents' meeting, that Mrs. Frolkey, a fourth grade teacher at the Flippin schools, had been an excellent librarian while employed at the Eureka Springs schools. Sneed called Frolkey advising her of Hurst's resignation and requested that she submit an application for the position if she was interested. On June 7, 1980, Frolkey's application was received.

Frolkey was well known to everyone in the Flippin school community. She possessed a double Arkansas certificate as Librarian/K-12 (Kindergarten through Twelfth Grade/Elementary). Frolkey had taught fourth grade at Flippin since 1977. Although her application reflected only one year as a librarian at the Eureka Springs high school because of space limitations on the application, she had a total of six years' experience employed as a school librarian in two Iowa schools similar in size to Flippin prior to her position in Eureka Springs.

The board unanimously selected Frolkey for the librarian position. All of the board members testified that Frolkey was chosen because they felt she was the most qualified. They noted that Norcross had served ten years earlier as an "assistant librarian," while on the face of the application Frolkey had served within the past six years as a "librarian" in a similar sized school. Norcross's total teaching experience comprised three years as an assistant librarian at F.M. Black Junior High School in Houston, Texas, and one year as a teacher's aide in Flippin, while Frolkey had 22 years' teaching experience, five years as head librarian in a high school similar to Flippin, and had taught three years in the Flippin school district with a double certification.

The board members regarded both Frolkey and Norcross as qualified and indicated that Norcross would have been chosen had Frolkey not been.

UNIT ELEVEN

THE LAW RELATING TO INSTRUCTION

I. COURSE OF STUDY

A. Legal Basis

1. The state has the power to prescribe the curriculum and studies in the public schools. (KRS 156.160). When the state has adopted a uniform program of study, local boards of education must follow it. In Kentucky there is a "Program of Studies for Kentucky Schools Grades K-12," which provides curriculum guidelines for local school districts. Each school district is sent a copy of the entire document, which is revised every few years.

2. In the absence of state prescription, the local board has the duty to prescribe the teaching of whatever subjects it deems best.

3. Although local boards must offer all specific subjects required by the state, the local school board has the authority to determine the scope of the course and the method to be employed in teaching it.

4. Local school boards have the power to go beyond state requirements. As long as what is taught is not immoral nor clearly inimical to the interests of society, a board's plan to offer a subject may not be denied by the police power of the state.

5. The courts will not judge the propriety of the school curriculum methods of teaching, nor interfere in the courses of study prescribed by a school board acting within the scope of its authority, except when the constitutional or civil rights of pupils are denied. (Religious instruction: racial or sex discrimination.)

B. Special Kentucky Requirements

1. Boards of education are required to fix one day each week when pupils may be given released time for religious or moral instruction off school premises. (KRS 158.220).

2. KRS 158.295 requires the state board for elementary and secondary education to develop regulations whereby local school districts may develop programs to deal with delinquency, drug abuse, vandalism, absenteeism, and other related acts of student behavior.

3. Instruction in alcohol and drug education shall be conducted in the elementary and secondary schools. (KRS 158.410).

4. Courses mandated by the General Assembly change from time to time. For example, the 1988 session enacted HB 345 and HB 928 mandating courses in Parenting and Family Life Skills and a Kentucky Government Curriculum, respectively.

5. Other courses may be mandated by state administrative regulations or accreditation standards. (See 704 KAR 3:304-305, for example).

C. Selection of Textbooks and Other Books

1. In the absence of constitutional or legal directives local boards of education have wide latitude in the selection of textbooks and other books.

2. The courts will refuse to sustain objections by individual citizens or groups unless the books are legally obscene or maliciously written for the purpose of promoting a bigoted hatred of a particular racial or religious group.

3. Of course, any state constitutional or statutory regulations take precedence over local school board regulations.

4. In Kentucky no textbook shall be used in any public school as a basal textbook unless it has been approved and listed on the state multiple list of textbooks by the state textbook commission. (KRS 156.445).

5. The state board for elementary and secondary education may authorize school districts to select and use supplementary textbooks and materials other than those listed by the state textbook commission. (KRS 156.447).

6. A parent who has a religious or conscientious objection to his child reading a certain textbook may secure an exemption from a requirement that the child must read any particular book or section thereof. The exemption is not automatic, but must be based on a good-faith objection. Even then the compelling state interests of the school system must be considered. (Judge Cornelia G. Kennedy, dicta, concurring in Mozert v. Hawkins 6th Cir., 1987.)

D. Fee Policies

1. Pupils may not be charged tuition or matriculation or registration fees, except that boards of education may charge a tuition fee for students living out of the school district. (KRS 158.120).

2. Pupils may not be required to pay athletic, library, literary, or other such fees as a condition of being admitted to school.

3. Incidental fees may be charged of students as a condition of their participation in certain activities which are not a part of the required educational program.

4. KRS 160.330 provides that boards of education may furnish necessary school supplies free of charge to indigent children in the school district and to such other children as it deems advisable.

5. School districts may charge fees for school supplies except as follows:

   a. A school district may not charge if the reason for the fee relates solely to the fulfillment of a handicapped child's individual education program (IEP).

   b. No child shall be denied full participation in any educational program due to an inability to pay for necessary school supplies.

6. KRS 157.100 provides that the state shall distribute textbooks for use without cost by pupils attending grades kindergarten through 12 in the public schools of Kentucky. (See KRS 157.110, however.)

7. If sufficient funds are not available to furnish textbooks for all pupils, the superintendent of public instruction shall determine for what grades and subjects textbooks shall be provided. (KRS 157.110).

8. Private school pupils are not eligible to receive free textbooks under KRS 157.100.

9. Local school districts which do not provide free textbooks for all students in grades 9 through 12 shall establish a process whereby pupils may rent textbooks at a reasonable fee.

10. No pupil shall be denied the use of textbooks due to an inability to rent or purchase them. (KRS 157.110).

II. PARENTS' RIGHTS IN INSTRUCTION

A. Parent Rights vs. Welfare of the State

1. Parents sometimes contest the right of the board of education to control the instructional program because of:
    - a. The lack of explicit constitutional or statutory authority assigned to boards;
    - b. The conflict between the common-law principles of family autonomy and state welfare.
    - c. Uncertainty about the extent to which the state can go without infringing on constitutional rights of pupils or parents.
2. The fundamental legal principles are in conflict, namely:
    - a. The right of a parent to guide his child's education (based on welfare of the child);
    - b. The right of the board as a representative of the state to direct the child's education (to enhance the welfare of society).
3. The courts must strike a balance between these two conflicting rights.

B. Selection of Subjects

1. Parents may make a reasonable selection from among the subjects offered by the school district. When a selection has been made, the pupil must be excused from taking courses to which the parent objects unless the subjects are essential to citizenship, but the pupil cannot graduate without taking all required courses.
2. Courts have sometimes, but not always, permitted parents to have their children excused from physical education, family life and sex education, social dancing, and other courses to which they object on a moral or religious basis.

3. The right of a parent to have his child excused from a course does not mean that the parent can prevent such courses from being introduced into the public school curriculum.

4. The reasonable selection of courses by a parent does not entitle a parent to insist that his child be taught courses not included in the curriculum of the school.

III. GRADING POLICIES

A. Need for Standards and Policies

1. The school board has the legal authority to prescribe rules governing the retention, promotion, and graduation of pupils, subject to specific statutory provisions.

2. The decision as to whether a pupil is entitled to graduate or be promoted or retained is for the most part a matter of local discretion.

3. The failure of a child to meet the school curriculum requirements or to receive passing grades is a matter of discretion of teachers and administrators. If these decisions are made in good faith, they ordinarily will not be reversed by the courts.

4. In order to avoid abuse of discretion it is highly desirable that grading policies and minimum standards be clearly communicated to pupils and their parents.

5. Kentucky law provides that when a pupil completes the prescribed course of study in any approved elementary school, he is entitled to a certificate of completion which entitles him to admission into any public high school. Any credits earned in any approved public school are valid in any other public school, but administrators may assign the pupil to the grade or class to which he is best suited. In case a pupil transfers to another district, he may not be assigned to a lower grade until he has demonstrated he is not suited for work in the grade to which he has been promoted. (KRS 158.140).

6. Policies regarding ability grouping should be carefully drawn to avoid charges of discrimination. In several court cases groupings based on achievement tests or I.Q. tests have been disallowed on the grounds such tests are

biased against black pupils. A "tracking" system in the Washington, D.C. schools was ruled unconstitutional when pupils were assigned to curricular tracks by examinations given early in their school careers and found it almost impossible to move from one track to a higher one. (Hobson v. Hansen, 269 F. Supp 401, D.C., 1967.)

B. Students' Right of Appeal

1. Students may appeal grades and promotion decisions to the principal, superintendent, and the board of education.

2. Courts of law normally will not concern themselves with questions of a student's academic progress unless a prima facie case has been made of discrimination or denial of constitutional rights.

C. Right to Withhold Grades, Diplomas, and Transcripts

1. A pupil who has met graduation requirements may not be denied a diploma or transcript for failure to pay fees.

2. Students who fail to meet reasonable academic requirements may be denied graduation.

   a. School authorities are vested with sound discretion in determination of whether a pupil has completed the requisite courses and possesses the necessary qualifications for graduation.

   b. Passing a functional literacy test may be required as a prerequisite for a high school diploma, provided the test is a valid measure of instruction. (Debra P. v. Turlington, 564 F. Supp. 177, 1984.)

   c. If the requirements have been met, the issuance of the diploma is a mandatory ministerial act. (The board has no choice; it must issue the diploma.)

3. Withholding a diploma for disciplinary reasons is illegal.

   a. A pupil may be denied the privilege of participating in graduation ceremonies for refusal to wear a cap and gown, but the diploma cannot be withheld.

   b. A pupil who fails to earn credits because of suspension or expulsion may be denied promotion or graduation until the requisite credits are earned.

4. Reducing a pupil's grades for disciplinary reasons is probably illegal in Kentucky.

   a. KRS 160.295 suggests but does not require that local districts adopt a code of student rights and responsibilities granting students the right to receive academic grades based upon academic performance.

   b. Although KRS 160.295 is permissive rather than mandatory, regulations of the state board of education require such a code for state accreditation.

   c. In the only reported Kentucky case on this subject the court held in favor of a student whose grades had been reduced due to the unexcused nature of his absences while suspended. (Dorsey v. Bale 521 S.W. 2d 76, 1975.)

IV. EDUCATION OF THE HANDICAPPED

A. Public Law 94-142 requires that all handicapped children ages three through twenty-one shall be provided with free appropriate public education.

   1. Recent judicial rulings have made it clear that school-age handicapped children, regardless of mental, physical, or emotional disability have a right to equal access to a public education.

   2. The use of such words as "free" and "public" make it clear that parents must not be required to contribute to the cost of educating a handicapped child.

   3. A handicapped child who requires placement in a residential program should be so placed that the cost of the program, including room and board, must be at no cost to the parents of that child.

B. All handicapped children are entitled to an education that is appropriate to meet their unique needs.

   1. In order to provide an "appropriate" education, an individualized education program (I.E.P.) will be developed for each child.

2. The I.E.P. shall include:

    a. A statement of the present levels of educational performance of each child.

    b. A statement of the annual goals, including short-term instructional objectives.

    c. A statement of the specific educational services to be provided to such child, and the extent to which the child will be able to participate in regular educational programs.

    d. The projected date for initiation and anticipated duration of such services and

    e. Appropriate objective criteria and evaluation procedures and schedules for determining whether instructional objectives are being achieved.

C. P.L. 94-142 requires each child be educated in the least restrictive environment.

1. The term "mainstreaming" is not used in the law.

2. Exceptional children shall be removed from the regular educational environment only when the nature or severity of the exceptionality is such that education in the regular class with the use of supplementary aids and services cannot be achieved satisfactorily.

3. Each agency providing educational services shall insure that a continuum of placement alternatives is available to meet the needs of exceptional children, including instruction in the regular classroom, special classes, special schools, and home and hospital instruction.

4. A child, once having been assigned to a special setting, will return to the regular environment as soon as such return is consistent with his capabilities and educational needs as determined by the appropriate admissions and release committee.

D. Both P.L. 94-142 and Kentucky Administrative Regulations (707 KAR 1:051, Section 3) provide due process of law for handicapped pupils and their parents.

1. The local school district must establish one district-wide administrative admissions and release committee.

2. A school-based admissions and release committee shall be established in each school, consisting of:
    a. Principal or his designee (chair)
    b. Referring teacher(s)
    c. Teacher(s) of exceptional children
    d. Parents of the referred pupil
    e. The referred child, where appropriate
    f. Personnel responsible for providing evaluation information
    g. Other members providing input into the referred pupil's educational program as requested by the committee.
3. The child shall be represented by his parents at all decision-making points in the identification, evaluation, and placement process.
    a. Parents shall be notified that the child has been referred as a possible candidate for a special program and that the child has a right to a free, appropriate public education.
    b. Parents shall receive written notice in English and in the primary language of the home regarding identification, evaluation and placement procedures.
    c. The school district shall obtain written parental permission prior to individual evaluation and placement.
    d. Parents shall be notified annually that they have access to relevant school records.
    e. Parents have the right to obtain an independent educational evaluation.
    f. Either the parents or the school district may request a hearing to resolve disagreements.
    g. If the parents are unavailable, a surrogate parent shall be assigned to represent the child.

h. Evaluation materials must not be racially or culturally discriminatory.

V. EXTRA CURRICULAR ACTIVITIES

A. Definition

1. Basic curriculum is the category of school activities to which a pupil has a right. Extra-curricular activities is a second category of school activities in which a pupil's participation can be viewed as a privilege.

2. Different judges view extra-curricular activities differently. Those who uphold restrictive school policies feel that extra curricular activities as less important than the academic program. Other courts view policies restricting participation as excluding students from an "integral and complementary part of the total school program." (Davis v. Meek 344 F. Supp. 298, 1972.)

B. Right of Students to Particpate

1. The privilege of participating in athletic competition *per se* is not protected by the due process clause. If a state or local district chose to eliminate interscholastic athletics entirely, no substantial federal question would be raised. (Mitchell v. La. High School Ath. Ass'n. 430 F. 2d 1155, La., 5th Cir., 1970.)

2. The school boards' authority to regulate schools extends to extra curricular school activities. Clubs whose membership depends upon permission of the members rather than the free choice of the qualified students (being open to all on equal terms) are banned in many states.

C. Grounds for Exclusion

1. There is no constitutional right to participate in high school sports, but courts have held that female students were denied equal protection of the laws if benefits provided to male students were denied to them. (Brenden v. Independent School District, 477, F.2d. 1292, 8th Cir. 1973.)

2. The Sixth Circuit Court of Appeals has ruled that female students have the right to participate with males in all noncontact sports, even if separate teams for girls are provided. (Morris v. Michigan State Board of Education, 472, F.2d 1207, 6th Cir. 1973.)

3. A federal district court within the Sixth Circuit has also held, contrary to most opinion elsewhere, that girls have the right to participate on contact sports teams traditionally reserved for males. (Yellow Springs Exempted Village School District v. Ohio School Athletic Association, 443 F. Supp. 752, S.D. Ohio, 1978.)

4. Any school-affiliated organization may enroll only students from that school, thus excluding graduates or students who dropped from school.

5. Excluding student athletes from team participation for violating prohibitions on drinking, smoking, or using drugs has been found by the courts to be reasonable and to serve a legitimate rational interest to discipline student athletes. (Bunger v. Iowa High School Athletic Association 197 N.W. 2d 555, 1971, and Braesch v. De Pasquale, 165 N.W. 2d 842, 1978.)

6. Students failing to meet academic standards may be excluded from participation in extracurricular activities.

7. In Kentucky an athletic association may make a rule as to the age of a child to be eligible to participate. (OAG 75-201).

8. Although a school board may adapt a hair style code, it may not have a separate code for athletes and may not delegate the making of the code to others. (OAG 73-284).

9. Since 1971 the majority of courts have ruled that students cannot be excluded from extra-curricular activities because they are married. A Kentucky Attorney General's opinion supports the majority view (OAG 62-996).

C. Interscholastic Associations

1. Court cases have upheld the right of state high school athletic associations to enforce rules on schools or school districts.

2. Courts have different views on the nature of the rules athletic associations are able to make.

   a. Acts of state high school athletic associations are usually viewed like acts of a state or local educational authority. Therefore, athletic association rules are subject to constitutional law (matters primarily dealing with equal protection and due processes) and to common law. (Leffel v. Wisconsin Int. Athletic Assn., 398 F. Supp. 749, 1975.)

   b. Athletic associations are sometimes considered voluntary organizations which may make such rules as they see fit. Once rules have been made they must be applied and enforced and without discrimination. (Mitchell v. La. High School Ath. Ass'n.)

3. Kentucky now has an academic association to promote academic competition among member schools. More information about this association is included in the supplement at the end of this Unit.

E. Equitable Treatment for the Sexes

1. Federally aided schools cannot discriminate between boys and girls, under Title IX of the Education Amendments of 1972, the Equal Educational Opportunity Act of 1974, and other related acts.

2. Federal Administrative Regulations under Title IX state that no "person shall, on the basis of sex, be excluded from participation in...or otherwise be discriminated against in any interscholastic, intercollegiate, club or intramural athletics..."

3. Exceptions to this are contact sports and situations in which teams are formed on the basis of competition skill, in which case separate teams may be maintained.

4. Contact sports include "boxing, wrestling, rugby, ice hockey, football, basketball, and other sports...(which involve) bodily contact." (45-Code Fed. Reg. 86.41, 1975.)

5. In noncontact sports, such as tennis, skiing, golf, and cross-country, a majority of courts have held that sex-biased exclusion from the sports is either unconstitutional or a violation of Title IX.

6. In Kentucky any secondary school which maintains a basketball team for boys for other than intramural purposes, shall maintain the same for girls. (KRS 157.350.)

7. Treatment as an equal is not necessarily the same as identical treatment, however, the Supreme Court principle applied in many sex discrimination cases is that a "classification must be reasonable and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons...shall be treated alike."

VI. STUDENT RECORDS

A. The Supreme Court has declared the right to privacy as a constitutional right based on the Fourth, Fifth, and Ninth Amendments. (Mapp v. Ohio 367 U.S. 643, 1965, and Griswold v. Connecticut 381 U.S. 479, 1965.)

B. The Family Educational Rights and Privacy Act of 1974, PL 93-380, known as "The Buckley Amendment" requires that all educational institutions receiving funds from the U.S. Office of Education must allow parents of students under eighteen and students eighteen or older or in a post-secondary school certain rights regarding school records.*

1. School records are all official records, files and data directly related to the child, maintained by a school or educational agency or their employees.

2. Rights under this act include the right to:

    a. Inspect and review that student's records;

    b. Challenge or request the removal or change of materials thought to be inaccurate, misleading, or inappropriate;

    c. Limit the number and type of persons who will be able to see a student's records;

    d. Receive a list of those individuals who have been permitted to see a student's records;

    e. Be notified when the records are turned over to a court by judicial order or subpoena;

    f. Be informed of the provisions of this act.

3. Standards for a "hearing" when challenging school records:

    a. Hearings must be conducted within a reasonable time.

    b. Hearings must be conducted by an impartial hearing officer.

    c. There must be an opportunity for the parent or student to present evidence.

    d. They must receive a written decision within a reasonable time.

4. Improper release of a student's records or false, misleading, or inappropriate statements in the student's records may result in personal liability for violation of the student's civil rights or for defamation.

* Kentucky law permits parents of students under age 21 to have access to school records. (KRS 164.283)

5. KRS 61.870-61.884 deal with Open Records regulations. Two of the statutes are applicable to this discussion.

    a. KRS 61.878 right of inspection only on order of court

       Public records containing information of a personal nature where the public disclosure thereof would constitute a clearly unwarranted invasion of personal privacy are excluded from the application of KRS 61.870 to 61.884 and shall be subject to inspection only upon order of a court of competent jurisdiction.

    b. KRS 61.884 Person's access to records relating to him

       Any person shall have access to any public record relating to him or in which he is mentioned by name, upon presentation of appropriate identification, subject to the provisions of KRS 61.878.

6. Destroying or purging student records is often done by school systems as a means of up-dating. The Buckley Amendment does not prohibit schools from destroying records. However, once parents or students request access, the regulations mandate that records cannot be destroyed. Public school systems usually have procedures or policies concerning length of time that records are to be kept.

Supplement to Unit Eleven

Program of Studies

The purpose of the Program of Studies for Kentucky Schools: Grades K-12 is to provide local school districts with the information they need to design their curriculum for elementary, middle, high, and vocational school programs. It contains information related to general program philosophy as well as specific course content. Teacher certification for specific courses is identified and reference material is cited as appropriate.

The content of the Program of Studies is determined by curriculum committees under the guidance of the Department of Education and specific program/subject specialists. The curriculum committees are composed of teachers and administrators who have practical experience with the many implications of each area and/or course.

The courses and programs included in the Program of Studies are used as the basis for determining textbooks to be used in the schools. Since textbooks are purchased on an established cycle, the various areas of the Program of Studies will be reviewed following that same cycle. Any changes made in an area will be completed prior to the date for which advertisements for the textbooks to be bid in that area are due (usually May of each year). This is necessary in order to assure that the textbooks address the specific courses as described in the Program of Studies. Adoption of the textbooks occurs a year later (usually July).

The cycle for review is:

		Advertise	Adopt
I	Social Studies	1986	1987
II	Language Arts	1987	1988
III	Science	1988	1989
IV	Mathematics	1989	1990
V	Reading, Music Vocational Education	1990	1991
VI	Literature, Art, Health Foreign Language, Physical Education and ESL	1991	1992

In the event of major external changes which affect the Program of Studies, the necessary attention will be given to the program or area regardless of its sequence in the cycle.

LEGAL BASE FOR THE PROGRAM OF STUDIES

The following statutes and regulations provide a legal base for this publication:

KRS 156.160 Adoption of rules and regulations by State Board of Education.

The State Board of Education shall adopt rules and regulations relating to:

(1) Minimum courses of study for the different grades and kinds of common schools, and regulations governing educational equipment of the schools.

(2) Grading, classifying and accrediting all common schools, and for determining the scope of instruction that may be offered in the different classes of schools, and the minimum requirements for graduation from the courses offered.

704 KAR 3:304 Required program of studies

Section 1. Pursuant to the authority vested in the State Board of Education by KRS 156.070 and 156.160, the "Program of Studies for Kentucky Schools, Grades K-12," as amended on October 1, 1986 is hereby filed with the Legislative Research Commission and incorporated by reference. Copies may be obtained from the Department of Education Office of Instruction, Division of Program Development.

KRS 161.020 Certificates required of school employees; filing requirements; validity and terms for renewal.

(1) No person shall be eligible to hold the position of superintendent, principal, teacher, supervisor, director of pupil personnel, or other public school position for which certificates may be issued, or receive salary for services rendered in such position, unless he/she holds a certificate of legal qualifications for such position.

(2) No person shall enter upon the duties of a position requiring certification qualifications until his certificate has been filed or credentials registered with the board of education employing him.

NOTE: The accreditation process requires that a teacher be teaching in the program area identified on his/her certificate. This requirement is incorporated by reference into regulations.

GENERAL CURRICULUM GUIDELINES

The "Program of Studies for Kentucky Schools, Grades K-12" provides administrators and teachers in local districts with a basis for establishing and/or revising their curriculum. The following sections provide general information about requirements in specific parts of the educational program.

KINDERGARTEN EDUCATION

Kindergarten programs place emphasis on "learning by doing." Scheduling reflects large blocks of time for independent choice, "hands-on" activites, and discovery learning rather than "paper and pencil oriented" table activities. Children also receive instruction in areas such as art, music, physical education, and library science.

ELEMENTARY EDUCATION

Sixty-five percent (65%) of the time in each elementary (grades 1-8) school week shall be spent on the basic skills of reading, spelling, writing, library research reference skills and mathematics (KRS 158.665).

Subject matter content in the elementary schools for the sixty-five percent (65%) time block shall consist of social studies, mathematics, science, language arts, library research reference skills, and foreign language when it is offered as an elective.

To meet the sixty-five percent (65%) time requirement based on the six hour instructional day, elementary pupils shall receive a minimum of 1,170 minutes per week of instructional time in the basic curriculum areas.

The elementary curriculum for all pupils in grades 1-4 shall include the following programs and times:

LANGUAGE ARTS, including reading, spelling and library research reference skills is taught 750 minutes per week minimum.

MATHEMATICS, with emphasis on concept development, computational skills, problem solving, and the application of same to practical situations is taught 300 minutes per week minimum.

SCIENCE, including "hands-on" experiences is taught separately and/or integrated in the regular program the equivalent of 120 minutes per week minimum.

SOCIAL STUDIES, including citizenship, attitudes, values, and responsibilities is taught separately and/or integrated in the regular program the equivalent of 120 minutes per week minimum.

PHYSICAL EDUCATION, including safety, is taught 100 minutes per week minimum.

FINE ARTS, including art, music, and drama is taught separately and/or integrated in the regular program the equivalent of 120 minutes per week minimum.

HEALTH, including safety, is taught as a separate course in the regular program 60 minutes per week minimum. Safety will be appropriately included in all areas of the curriculum.

The two hundred thirty minutes per week of unassigned time may be assigned to any of the above areas or to foreign language.

MIDDLE CHILDHOOD EDUCATION

Sixty-five percent (65%) of the time in each elementary (grades 1-8) school week shall be spent on the basic skills of reading, writing, library research reference skills and mathematics (KRS 158.665).

Subject matter content in the elementary schools for the sixty-five percent (65%) time block shall consist of social studies mathematics, science, language arts, library research reference skills, and foreign language when it is offered as an elective.

To meet the sixty-five percent (65%) time requirment based on the six hour instructional day, middle childhood pupils shall receive a minimum of 1,170 minutes per week of instructional time in the basic curriculum areas.

The middle childhood curriculum for all pupils in grades 5-8 shall include the following areas and times:

LANGUAGE ARTS, including reading and library research reference skills, is taught 300 minutes per week minimum.

MATHEMATICS is taught the equivalent of 225 minutes per week minimum.

SCIENCE is taught the equivalent of 225 minutes per week minimum.

SOCIAL STUDIES is taught the equivalent of 225 minutes per week minimum. Beginning in August 1987, and thereafter, Citizenship shall be incorporated into the eighth grade (8th) U.S. History course.

> **NOTE:** An additional 195 minutes per week must be spent in basic skills instruction in order to meet the 65% of time requirement. This may include foreign language.

PHYSICAL EDUCATION, including safety, is taught of 75 minutes per week minimum.

HEALTH, including safety, is taught as a separate course in the regular program of 60 minutes per week minimum.

ART is taught the equivalent of 75 minutes per week minimum.

MUSIC is taught the equivalent of 75 minutes per week minimum.

Three hundred forty-five (345) minutes of optional time each week may be used for Applied Arts, Foreign Language, other electives, and/or required programs.

All pupils in grades 9-12 shall fulfill the minimum unit requirements indicated below for high school graduation (704 KAR 3:305). Relative to required credits for those subjects in this section, students, except those repeating such courses and except as otherwise set forth in 704 KAR 3:305 Section 2(3), shall have completed at least two (2) credits in English, two (2) credits in science, and two (2) credits in mathematics at the end of the tenth grade level. Also, a local district shall fulfill the program area level requirements indicated below for accreditation. These requirements pertain to a four-year high school.

All secondary school students in grades nine (9) through twelve (12) shall continue to develop competency in reading and writing, including grammar and spelling, with sixty percent (60%) of their time devoted to basic skill development in the curriculum areas of English, language arts, science, mathematics, social studies, and foreign language when it is taken as an elective (KRS 158.665). In order to meet the sixty percent (60%) time requirement, twelve (12) of the twenty (20) required credits must be in language arts, mathematics, science, social studies, foreign language, or an identified vocational education course. Vocational education courses which have been identified as meeting this requirement are marked with an asterisk in the sections of this document which list the various vocational education offerings.

The minimum units which are required for graduation are listed below. State requirements enumerate twelve (12) units one of which is comprised of 1/2 unit of health and 1/2 unit of physical education. An additional unit (a thirteenth (13th) unit) is also required to meet the sixty percent (60)% time requirement as stated above. It may be selected from among the language arts, mathematics, science, social studies, foreign language or vocational education courses.

PROGRAM AREA	MINIMUM HIGH SCHOOL GRADUATION REQUIREMENTS	ACCREDITATION PROGRAM AREA LEVEL REQUIREMENTS
Language Arts	4 units	4 levels
Social Studies (Includes U.S. History, 2243)	2 units	3 levels
Mathematics	3 units	3 levels
Science	2 units	3 levels
Health	½ unit	1 level
Physical Education	½ unit	1 level
Art	--	3 levels
Music	--	3 levels
Foreign Language	--	3 levels
Industrial Arts/ or Industrial Education Level I and II		2 levels
Business Education	--	3 levels
Home Economics	--	3 levels
Optional course to meet basic skills 60% time requirement	1 unit	
Total units required:	13	
Total electives	7	
GRAND TOTAL	20	

FROM THE FORT THOMAS, KENTUCKY, CITY SCHOOLS

SOME SUGGESTED CRITERIA FOR TEXTBOOK EVALUATION

I Contents

1. Is the text challenging? Meaningful? Interesting?
2. Does the book contain all the basic concepts for its level?
3. Does the book lend itself to the development of democratic values?
4. Are there provisions for relating the book to real life situations where the student can actually learn by doing?
5. Does the book have challenging activities for students of all abilities?
6. Are there sufficient illustratons, maps, charts, and graphs?
7. How about balance and emphasis?
8. Is the content compatible to existing curriculum guides?
9. Does this text meet the needs of our system? (For both students and teacher?)

II Readability

1. Is it written on the appropriate reading level?
2. How about sentence length and structure?
3. Are there provisions for vocabulary expansion?
4. How readable are the illustrations, charts, maps, and graphs?
5. What about the size and boldness of print?

III Organization

1. Does the book have logical scope and sequence?
2. How about the table of contents, glossary, and index?
3. Are the illustrations, charts, maps, and graphs well placed?
4. Are there provisions for periodic review, drill, and evaluation?
5. Is text so organized that it can easily be supplemented by other texts?
6. Is it well arranged for unit teaching?
7. Are there provisions for both the slow and fast learner?

IV Physical Features

1. Is the cover attractive?
2. How about the quality of paper?
3. Is the book colorful and appealing?

V Teaching Aids

1. Is there a manual or teachers editions available? Will it do the job?
2. Does the text give references to other books for enrichment?
3. Are discussion topics listed?
4. Are there vocabulary studies?
5. Are there good audio-visual suggestions?

SAMPLE FORM FOR TEACHERS FROM FORT THOMAS, KENTUCKY, CITY SCHOOLS

Exhibit "A"

MATERIAL REQUEST FOR RESOURCE CENTER

Requested by____

Department and Grade Level for which recommended____________________

Type of Material____

Author (if printed materials)________________________________

Title of Material____

Publisher or Producer____________________________________

Date of Publication____________________Cost__________________

Brief Summary of content__________________________________

____

____

Material was viewed personally? Yes____ No_____
Read professional review of material? Yes____ No_____
Journal in which review was found?____________________________
(Title of Journal)

____________________ _______________
Date of Journal page no.

Has this been approved by your department? (High School only) Yes___ No___
His this been approved by other teachers at your grade level within your school?
(Elementary only) Yes___ No___

SAMPLE

BULLITT COUNTY BOARD OF EDUCATION
SHEPHERDSVILLE, KENTUCKY

COMPLAINTS ABOUT INSTRUCTIONAL MATERIALS

CITIZEN'S REQUEST FOR RECONSIDERATION OF A BOOK

Author Hardcover Paperback

Title

Publisher (if known)

Request initiated by ______________________________

Telephone __________ Address __________________ City ________________

Complainant represents: _____ himself ______________________

_____ (name organization) ______________________

_____ (identify other group) ______________________

1. To what in the book do you object? (Please be specific; cite pages)

____

____

____

2. What do you feel might be the result of reading this book?

____

____

3. Did you read the entire book? _____ What Parts? ________________

____

4. Are you aware of the judgment of this book by literary critics?

____

5. Do you feel that this material should be kept just from your child or do you feel that it should be reviewed for possible removal from the school?

____

____

SAMPLE

____
Signature of Complainant

Education for All Handicapped Children Act of 1975

Quiz Yourself!

Check how well you understand PL 94-142 by taking this quick True-False quiz.

1. A "free,appropriate public education" means that special education and related services are provided at public expense, without charge to parents.

2. Free, appropriate education for handicapped children includes only elementary and secondary school education.

3. Handicapped children included through the provisions of the Act include those evaluated as being mentally retarded, hard of hearing, deaf, speech impaired, visually handicapped, seriously emotionally disturbed, orthopedically impaired, multi-handicapped, or having specific learning disabilities.

4. Specific learning disabilities include learning problems related to perceptual handicaps, dyslexia and environmental, cultural, or economic disadvantage.

5. Under PL 94-142 related services that enable handicapped children to benefit from special education, such as transportation, speech pathology, psychological services, counseling, and medical services must be provided without cost to the parents.

6. Under PL 94-142, a school could be required to provide a handicapped child with catherization to drain the child's bladder during school hours.

7. Handicapped students must be placed in a program as close to the regular program as the student can handle.

8. Handicapped students must be provided with an individual, written statement explaining how the school system plans to educate them.

9. School systems and teachers can be held accountable if a child does not achieve the goals set out in the Individualized Education Program.

10. Parents must be fully informed in their native language of all information relating to the identification, evaluation and placement of their handicapped child.

11. If a parent disagrees with an evaluation made by the school system, he or she has the right to an independent educational evaluation at public expense.

12. The educational agency is not required to consider the results of any parent initiated evaluation.

13. School systems are responsible for holding at least one meeting a year to develop, review, and revise a handicapped child's individualized education program.

14. Each school system must insure that, to the maximum extent possible, handicapped children are educated with children who are not handicapped.

15. The teacher who has referred a student for special education becomes a member of that child's admissions and release.

16. Expelling a mentally retarded student is a "change in educational placement" and cannot be done without providing the student due process protections.

17. The Act requires states to maximize the potential of handicapped children.

18. Unlike any other disruptive child, before a disruptive handicapped child can be expelled, it must be determined whether the handicap is the cause of the child's tendency to disrupt.

19. Even after expelling a handicapped student, educational services must be provided.

20. A parent or school district involved in a due process hearing has the right to be accompanied and advised by counsel.

Key to True-False Quiz

1. T

2. F - It may also include pre-school education.

3. T

4. F - Specific learning disabilities do include perceptual handicaps, dyslexia and also brain injury, minimal brain dysfunction and developmental aphasia. It does NOT include children who have learning problems as a result of environmental, cultural, or economic disadvantage.

5. T

6. T - *Irving Independent School District v. Tatro* 104 S.Ct. 3371.

7. T - This is essentially what "least restrictive environment" means.

8. T - This statement is the IEP - Individualized Education Program.

9. F - Part B of the Education of the Handicapped Act does NOT require that any agency, teacher, or other person be held accountable if a child does not achieve the growth projected in the IEP, as long as a good faith effort was made.

10. T

11. T - However, the public agency may initiate a hearing to show that its evaluation is appropriate. If the decision agrees with the agency, the parent has the right to an independent educational evaluation, but not necessarily at public expense.

12. F

13. T

14. T

15. T - According to 707 KAR 1:051 Section 3, the local school district must establish one district-wide and a school-based Admissions and Release Committee in each school. This committee includes the referred pupil's principal and teacher.

16. T - The Sixth Circuit Court of Appeals decided this in Kaelin v. Grubbs 682 F. 2nd 595 (1982).

17. F - In Hendrick Hudson District Board of Education v. Rowley 458 U.S. 176 (1982) the Supreme Court admitted that to "maximize the potential of each handicapped child..." was a desirable goal. But this is not the standard that Congress imposed upon states which receive funding under the Act, the Court said. Rather, Congress sought primarily to identify and evaluate handicapped children, and to provide them with access to a free public education. It is sufficient that "some educational benefit" is conferred upon the handicapped child.

18. T - See S-1 v. Turlington, 635 F. 2nd 342 (Fifth Circuit, 1981).

19. T - See S-1 v. Turlington.

20. T

A Violation of Title IX?

If the school programs in the situations below receive federal financial assistance, they stand to lose those funds if they discriminate on the basis of sex. Which, if any, of the following appear to be violations of Title IX?

1. A Family Relations textbook portrays women only in stereotypical homemaker roles.
2. A school does not spend as much money on its total girls' sports program as it does on the boys'.
3. A high school does not allow boys to sign up for a "Women in History" course.
4. A school has the policy of purchasing new equipment for boys' teams and passing the used equipment to the girls' teams.
5. Girls are not allowed to try out for the boys' varsity football team.
6. Since there is only one girl interested in girls' track, the school decides to eliminate that sport.
7. A high school dress code allows boys but not girls to wear jeans.
8. A school sponsors a Miss __________ County High School beauty pageant, with prizes awarded to the winner(s) of appearance, poise, and talent categories.
9. A school's counselors encourage girls to go into predominantly "women's jobs" and boys to "men's jobs."
10. A school selects male students to participate in Boy's State.

KENTUCKY ACADEMIC ASSOCIATION

The Kentucky Academic Association is a voluntary statewide organization designed to perform two major functions - to establish and sponsor a statewide system of academic competition and to monitor all other competition occurring in Kentucky and assess its compliance with standards of educational soundness established by the Association.

The Association is governed by a Board of Directors made up of seventeen members. Eight of the members are from various geographic areas across the state and are elected by schools within those areas who are members of the Association. The other nine members of the Board are persons who have been appointed by the Governor, the State Board of Education, the Kentucky Congress of Parents and Teachers, the Kentucky School Boards Association, the Kentucky Association of School Administrators, and the Kentucky Education Association. There also will be an ex officio, non-voting Board member appointed by the Superintendent of Public Instruction.

All Board members serve four-year terms which are staggered. The Board exercises general authority over the Association through regular and special meetings held several times each year. The Board employs an Executive Director and other staff to see to the day-to-day operation of the Association.

Membership in the Association is open to any accredited public school in Kentucky and any non-public school which voluntarily complies with state accreditation standards and which practices a policy of non-discrimination in admissions. Schools may apply for membership in one or more divisions of the Association. The divisions represent the grade levels in which competition is held - high school (9-12), middle grades (6-8), and elementary (K-5). Schools pay a nominal membership fee for each division they join. This entitles them to participate in all Association-sponsored competition held in that division. The membership application is provided by the Association.

There are, also, associate memberships available to persons, groups, or organizations other than schools who wish to be informed as to the activities of the Association.

In addition to being eligible to participate in Association-sponsored competition, member schools have a vote to elect a member to the Board of Directors, and they may, pursuant to the Constitution and By-Laws, submit proposed changes in governance of the Association or in rules of competition to the Board for action.

The competition sponsored by the Association is called the Governor's Cup Competition. It is a three-tiered (district, regional, and state) competition with those who are successful at one level advancing to the next level. The Association currently sponsors four categories of competition:

1. Quick Recall - Teams of four students compete to provide factual answers to questions presented in a "college bowl" format.

2. Creative Expression - Teams of four students work to solve a problem presented to them on the day of the competition.

3. Written Assessment - Individual students take a written test in math, science, social studies, or language arts.

4. English Composition - Individual students are given a topic and must write a well-developed essay within a specified time.

These categories are offered to high school and middle grade students. Competition for the elementary division is being developed.

A state champion will be determined in each category (four champions in the written assessment category). In addition, the Association employs a point system to determine the school whose students collectively achieve the highest level of performance at the state level. That school receives the Governor's Cup.

Any student of a member school is eligible to represent that school in the Governor's Cup Competition. The competition is designed to involve as many students as possible.

The second function of the Association is to establish standards of educational soundness which it feels all academic competition should meet and to review each competition in Kentucky to determine if it is meeting those standards. Standards relate to and review is based on the purpose, objectives, format, and rules of the competition, among other factors.

Each year the Association publishes a directory listing all academic competition in Kentucky which complies with the standards set by the Association. It includes a calendar of events for all competition, along with sponsors, locations, descriptions, and contact persons. This directory is distributed to all member schools, associate members, and other interested parties. The directory also includes a recommendation that member schools not participate in competition which fails to meet the standards set by the Association.

There is a provision for competitions which do not meet the standards to seek assistance from the Association in doing so. In addition, the standards will be periodically reviewed by an impartial team of qualified educators to determine their validity.

For further information, please refer to the Constitution and By-Laws or contact the Association.

GUIDELINES FOR PREPARING STUDENT RECORDS

Be sure that written statements are true.

Limit statements to those that are relevant and have a valid educational purpose.

Never make statements or write reports while you are angry.

If you must make potentially dangerous and libelous statements that are both true and have a valid educational purpose, document the statements carefully.

Ask yourself if the evidence of truth of a damaging statement would hold up in court - would be believable by a jury.

Written statements and evaluations should be objective. Avoid subjective value statements.

If you have any reservations or qualms about the necessity of recording certain information (and the information is not required to be kept, such as attendance records), don't include it.

REQUEST FOR REVIEW OR RELEASE OF STUDENT RECORDS

REVIEW REQUEST

(To be executed by student who wishes to review records)

Date: ____________________

I, ________________________ of ____________________________________
(Name of student) (Complete address of student)
hereby request that I be permitted to inspect and review the records of

____, pertaining to me.
(Department or office which has custody of record)

____
(Signature of student)

____
(Telephone number)

SAMPLE

RELEASE REQUEST

(To be executed by any person, agency, or organization, other than the student himself, desiring access to the records of a student)

Date: ____________________

I hereby request access to the records of _________________________
(Name of student)
on behalf of ____, for the following purpose: ____

____

The specific records requested are: __________________________________

____

____
(Signature of person desiring access)

Consent - (to be executed by student at the student's discretion in appropriate circumstances)

I hereby consent to the release of my records as requested above.

____
(Student's signature)

NOTE: This form to be retained by a custodian of records with the records of the affected student.

UNIT TWELVE

ATTENDANCE

I. RIGHTS OF PUPILS TO ATTEND SCHOOL

A. Generally

1. The U.S. Constitution does not mention specifically the right to a free public education.

2. The Equal Protection Clause of the 14th Amendment does guarantee that "no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

3. Every state has enacted legislation for the establishment and enforcement of education laws; hence, once a program of free public education has been established, the Equal Protection Clause requires that the law must be applied equally to any person within the jurisdiction of the state.

B. Rights of Residents in a School District

1. Determination of Residence

   a. Courts have recognized that residence and domicile are not necessarily synonymous.

   b. Residence entitling a child to school privileges is generally viewed in a liberal sense as meaning to live in or be an inhabitant of a school district. Typically a child of school age who is living with a resident who has custody or control will be allowed to attend in the district where he or she lives.

   c. A temporary residence merely for the purpose of obtaining the free school privileges of a specific district has been found insufficient in some cases and school privileges have been denied the child.

   d. In Kentucky, court decisions have been mixed on the issue of residence.

(1) Turner v. City Board of Education, Mayfield, Kentucky, 231 S.W. 2d 27 (1950), found "that every child has a statutory privilege of attending the public school in the district in which he lives, which refers to the place where the child is an inhabitant or lives in fact and not necessarily to his legal domicile in the technical and narrow sense of residence for the purpose of taxation or suffrage."

(2) In Board of Education, City of Winchester, v. Foster 76 S.W. 354, (1903) the district court ruled that a young girl who was living permanently with her uncle's family could not be considered a bona fide resident of the district since she was not legally adopted.

(3) OAG 77-311 states "that for school purposes a child's residence is not necessarily the residence of the child's parent(s), and if the child has assumed a permanent home with some other person standing _in loco parentis_ to the child, then the residence of the child for school purposes is the same as that of such person, for example, a foster parent.

(4) OAG 72-593 says that a school child must attend school in the district where he resides even though his parent pays taxes in another school district.

2. Denial of Equal Educational Opportunities

a. Racial Discrimination

(1) In Brown v. Board of Education of Topeka, 347 U.S. 483 (1954), the Supreme Court unanimously agree that black children by reason of segregation were deprived of the equal protection of the laws guaranteed by the 14th Amendment. The "separate but equal doctrine" was held to have no place in the field of public education.

(2) _De Jure_ segregation (i.e. segregation resulting from intentional state action) is constitutionally impermissable.

(3) _De facto_ segregation (i.e. segregation that may result from natural neighborhood development) may not violate the constitution.

b. Denial of Equal Opportunity for Handicapped Persons

(1) The Education of All Handicapped Children Act of 1975 (EAHCA) places a number of requirements on those agencies that receive federal dollars to assist in educating handicapped children.

(2) In Board of Education v. Rowley, 458 U.S. 176 (1982), the U.S. Supreme Court helped to clarify the responsibilities of states in the education of handicapped children. In Rowley the Supreme Court overturned two lower court decisions which required a New York School district to provide a sign language interpretation to an eight-year-old deaf child so that she would have the same educational opportunity as her classmates. The Supreme Court held that the EAHCA is satisfied when the state provides personalized instruction with sufficient support services to permit the handicapped child to benefit educationally from that institution. The Court stated that the EAHCA was not meant to guarantee a handicapped child a certain level of education but merely to open the door of education to handicapped children.

(3) In Kentucky: (1) KRS 157-200 to 157.305 describe the statutory regulation of Special Education programs in Kentucky; (2) OAG 76-678 states that Kentucky is exempt from the federal age requirement to provide Special Education services between the ages of 3 and 21 since Kentucky Statutes related to Special Education programs generally, were passed in 1948. In Kentucky, school districts shall provide Special Education programs for properly identified handicapped students between the ages of 5 and 21.

3. Married Students and Unwed Mothers

a. Married students and/or unwed mothers are not generally excluded from attendance solely for the reason that they are married. However, if the presence of a married student causes disciplinary problems or is judged to affect adversely the welfare of other students, school officials may deny admission.

b. A U.S. District Court in Georgia has ruled that a school district could require a married student or a student/parent to attend a fully accreditated evening program, but fees for books and/or tuition could not be charged. (Houston v. Prosser, 361 F. Supp. 295, 1973.)

c. A Kentucky Court held that a school board resolution providing that any student who married must withdraw immediately from school and could not reenter for one full year, and then only as a special student with permission of the principal, was arbitrary and therefore void. (Board of Education of Harrodsburg v. Bentley, 383 S.W. 2d 677, 1964.)

4. Students Residing in Institutions, Orphanages, or U.S. Military Installations

a. Generally students in institutions, orphanages, or United States Military installations will be allowed to attend the public school district in which the facility is located. This practice is consistent with the interpretation of residence described above in I.B.1.b. However, the Defense Department does operate its own schools on some military bases, including Fort Campbell and Fort Knox in Kentucky.

b. Wirth v. Board of Education, 90 S.W. 2d 62 (1935), held that wards of county children's homes are entitled to attend the county schools where the home is located.

c. OAG 74-681 states that "children in an institutional home are entitled to attend the public school in the district where the home is located."

C. Rights of Non-Residents

1. Generally school districts may not admit non-resident students unless there is express statutory authority. When school districts are permitted to accept non-resident students some sort of tuition or contract exists so that the accepting school district receives financial support in return for providing educational opportunities for the non-resident student.

2. Occasionally a school district will request another school district to accept a student when it would be more convenient for the child to attend school in the other district. Unique transportation problems or the absence of a special program may be reasons why a school district would desire to pay tuition to another school district.

3. In Kentucky, a school district that accepts a student from another district will enter into a non-resident contract with the school district in which the student resides. This contract will allow the transfer of

state foundation program funds. In addition, the receiving district may charge a tuition to cover costs that are in excess of transferred state funds. (KRS 158.130)

4. Five school districts in Kentucky do not have high schools and must make arrangements to send their students to a high school in an adjacent district.

5. OAG 80-47 states that Kentucky School laws "grant each local board of education discretion as to whether they will permit nonresident children to attend school in the district."

D. Rights of Homeless Children

1. The McKinney Homeless Assistance Act provides that homeless children have access to a free, appropriate public education on an equal basis with non-homeless children. This guaranteed access affects both:

   a. homeless children who are living with their parents in temporary housing, and

   b. children whose homeless parents have placed them temporarily with others.

2. Schools can neither insist that children living apart from their parents reside with a legal guardian in order to be admitted to school or refuse to admit these children unless homeless parents surrender their legal parental rights.

II. CONDITIONS OF ATTENDANCE

A. Generally

1. The statutory right of every child to attend the public school is always subject to reasonable regulations by the state legislature and to some extent by local boards of education.

2. State statutes or regulations on school attendance usually focus on conditions such as: entry age, evidence of vaccination, licentious or immoral character, successful academic progress, or disciplinary record in school previously attended (e.g. a mid-year residence change following an expulsion in another school).

B. Vaccination

1. Vaccination requirements are generally adopted and strictly enforced in most states.

2. KRS 158.035 states that no child shall be eligible to enroll in any public or private school without first presenting a certificate from a physician stating that the child has been immunized against diphtheria, tetanus, poliomyelitis, rubeola, and rubella.

3. KRS 214.034 requires that each child entering the public schools shall have proof of having been tested for tuberculosis prior to enrollment.

4. KRS 214.036 states that testing for tuberculosis or the immunization of a child shall not be done at a time when it would be injurious to the child's health. It further provides that a child shall be exempt from immunization where the parents object on religious grounds, except that in an epidemic all persons may be required to accept immunization.

5. Opposition to vaccination because of religious conditions has led to the prosecution of a parent(s) under state compulsory attendance laws. Religious opposition to vaccination has not been found to be a valid defense to the prosecution of a parent(s) under state compulsory attendance laws. (Zucht v. King, 260 U.S. 174, 1922.) However, the Kentucky exemption granted in KRS 214.036 has been upheld by a federal district court. (Kleid v. Board of Education, 406 F. Supp. 902, W.D. Ky. 1976.)

C. Who May Attend School in Kentucky?

1. Any child who is six (6) years of age, or who may become six (6) years of age by October 1 shall attend public school (KRS 158.030(1)).

2. Any child who is five (5) years of age, or who may become five (5) years of age by October 1, may enter a public school kindergarten (KRS 158.030(1)).

3. Effective July 1, 1986, successful completion of kindergarten shall be a prerequisite for a child's entrance into first grade (KRS 158.030 (2)). This section of KRS 158.030 is subject to State Board regulation outlined in 704 KAR 5:050. Successful completion of kindergarten for the purpose of first grade enrollment in the public schools, can be accomplished by any one of the following:

a. Completion of a Kentucky public kindergarten program and (1) demonstrated competence in the Kindergarten Kentucky Essential Skills (typically as measured by the criterion referenced portion of the Kentucky Essential Skills Test (KEST), and (2) a successful evaluation by the teacher of the child's social, emotional and physical development.

b. Completion of a non-public kindergarten program and (1) meets age requirements, can produce documentation of prior enrollment and regular attendance, and (2) recommendation for promotion to the first grade. (A child who attended a non-public kindergarten may be subject to reassignment to kindergarten provided the reassignment is based upon demonstrated competence in kindergarten essential skills.)

c. Completion of a kindergarten program from another state and (1) verification of enrollment and regular attendance, (2) a recommendation by a district superintendent for promotion to a first grade, and (3) proof of eligibility for enrollment in a public school kindergarten program under the laws of such state. (Again reassignment to kindergarten is possible as stated in "b." above.)

d. Waiver of the requirement of successful completion of kindergarten shall be given to children transferring from states where kindergarten attendance is not mandatory who (1) meet the first grade entrance age requirement, and (2) take the criterion reference part of the KEST to determine readiness for first grade.

III. COMPULSORY ATTENDANCE

A. Generally

1. States have a compelling interest in seeing that their citizens receive at least a minimal education and they may establish and enforce school attendance laws to that end.

2. In Kentucky, KRS 159.010(1) requires that any child between the ages of six (6) and sixteen (16) shall attend the public school in the district in which he/she resides (see exceptions below) for the full term that school is in session. H.B. 792, passed by the General Assembly in 1988, amended KRS 159.010 to apply to any child who has entered kindergarten. Thus, once they enroll in kindergarten, five-year-olds are covered by compulsory attendance laws.

3. KRS 159.010(2) also requires any student between the ages of sixteen (16) and eighteen (18) who wishes to drop out of school "shall do so only after a conference with the principal or his designee, and the principal shall request a conference with the parent, guardian, or other custodian. Written signed permission for withdrawal must be received from his parent, guardian or other person residing in the state and having custody or charge of him."

4. Written permission for withdrawal is not required after a student's eighteenth birthday or from a married student.

5. KRS 159.010 applies to all students whether or not they attend public school.

B. Compulsory Attendance at Public Schools Only is Unconstitutional

1. In Pierce v. Society of Sisters (268 U.S. 510, 1925), the U.S. Supreme Court held that statutes requiring the compulsory attendance of all children in public schools unconstitutionally interferes with the liberty of parents and guardians to direct the upbringing and education of children.

2. KRS 159.030, Exemptions from Compulsory Attendance, is consistent with Pierce decision and is discussed in Section "E" below.

C. Excused and Unexcused Absences

1. Generally a child who is temporarily absent from school for sickness or other reasons is not considered to be in violation of the compulsory attendance law.

2. Typically school authorities are vested with discretionary power to determine what constitutes a sufficient excuse for absence from school. Generally courts will not interfere with such power unless it has been substantially abused.

3. In most school districts students are required to bring excuses signed by their parent for all absences explaining the reason for the absence and the specific dates.

4. Typically the following reasons would be considered excused absences: personal illness (sometimes a limit is placed on the number of personal illness days that will be excused without a doctor's excuse); death of a relative or close friend; attendance at a funeral; and usually a district regulation will include some "other" reasons considered valid by the principal.

5. Examples of absences that are typically unexcused include: working at home or business, missed bus, distance from school or bus, suspension, overslept, too poor, out-of-town, and babysitting.

6. Make-up work is generally allowed only for excused absences. The responsibility to find out what has been missed during an excused absence usually rests with the student or parent. Sometimes districts allow students to make up final examinations even when an absence is unexcused.

7. The Fifth Circuit Court of Appeals has held unconstitutional as a violation of the Free Exercise Clause of the First Amendment a Texas school district policy that limited the number of excused absences for religious holidays to two days each school year. (Church of God v. Amarillo I.S.D., 670 F. 2d 46, 1982.)

D. Truancy

1. KRS 159.150 states that any child who has been absent from school without valid excuse (i.e. unexcused by definition of district, policy or regulation), for three (3) or more days, or tardy on three (3) or more days, is a truant.

2. Habitual truant is defined by KRS 159.150 as a child who has been reported as a truant three (3) or more times.

3. Upon the fourth occurrence of truancy (i.e. the 10th unexcused absence) the district Director of Pupil Personnel may institute truancy proceedings in juvenile court.

E. Exemptions to Compulsory Attendance in Kentucky (KRS 159.030)

1. A Board of Education may exempt from compulsory attendance the following:

    a. A graduate from an accredited or four (4) year high school;

    b. A student in regular attendance in a private, parochial, or church regular day school; (OAG 68-150 states that part-time (or shared time) enrollment in public and private schools does not offend the compulsory attendance law on the Kentucky Constitution provided subjects are equivalent to those students would receive if enrolled full time in either public or nonpublic school.)

c. A student less than seven (7) years old who is enrolled and in regular attendance in a private kindergarten or nursery school;

d. A student whose physical or mental condition prevents or renders inadvisable attendance at school or application to study; and

e. A student enrolled and in regular attendance in a state or private program for exceptional children.

2. Before granting an exemption under (1 d.) above the State Board of Education shall require a signed statement of licensed physician, psychologist, psychiatrist, or public health officer, that the condition of the child prevents or renders unadvisable attendance at school or application to study. Any child who is excused from school attendance more than six (6) months must have two signed statements from a combination of the health professionals listed above. All exemptions under the provisions outlined in (1 d.) above must be reviewed annually with updated evidence.

3. Any child exempted under the provisions above must be provided with regularly scheduled home, hospital, institutional, or other suitable institution.

4. In Wisconsin v. Yoder (406 U.S. 205, 1972) the U.S. Supreme Court held that the Amish "way of life" conflicted sharply with the values and programs of the modern secondary school and therefore compulsory attendance to age sixteen (16) years in Wisconsin interfered with First Amendment rights to religious freedom. The specific case concerned a fourteen (14) year old Amish youth in violation of the Wisconsin compulsory attendance law. The Supreme Court held that in the case of this fourteen (14) year old Amish youth the right of the state to prepare its citizens for a successful life interfered with the guaranty of free exercise of religion.

5. A married student, even though under the age of 16 years, may not be required to attend school but may continue in school by choice. (OAG 81-73.) However, a juvenile court judge may order such a student to attend school when she is made a ward of the court as a result of conviction for shoplifting. (Judge Wilfred Schoder, Kenton County Juvenile Court.)

IV. EDUCATION AT HOME

A. Generally

1. The degree to which home instruction is practiced in any state is dependent upon the state constitution, related state statutes, and relevant case law. Several states permit what is termed "equivalent instruction" in lieu of attendance at a public or private school. The criteria for determining "equivalent instruction" may or may not be very specific. Some statutes provide an express exception for home instruction; others provide no exception to home institutions.

2. Many home school cases have attempted to establish First Amendment and Fourteenth Amendment rights to home instruction. In a 1985 constitutional analysis of home instruction, (Zirkel, Perry, "Constitutional Contours of Home Instruction," a paper presented at the annual convention of the National Organization on Legal Problems of Education, Chicago, November, 1985) Perry Zirkel concludes that: (1) the fundamental religious right (First Amendment) to home instruction can be described at this point as being severely limited; and (2) the Fourteenth Amendment claim has been successful essentially only when the vagueness of state statutes in defining a "school" or "equivalent" has been challenged.

3. Zirkel concludes in the paper cited in the discussion above that "the current trend among legislators and administrative agencies at the state level is apparently toward allowing home instruction."

B. In Kentucky

1. The language of KRS 159.030 (Exemptions from Compulsory Attendance was amended by the 1984 Kentucky General Assembly to reflect a more favorable climate for the establishment of home schools. Prior to 1984 Section (1b) of KRS 159.030 stated that "students may attend private or parochial schools which have been approved by the state board for elementary and secondary education." In 1984, Section (1b) of KRS 159.030 was amended to state that students would be exempted from compulsory attendance if they were "enrolled and in regular attendance in a private, parochial, or church regular day school. It shall be the duty of each private, parochial, or church regular day school to notify the local board of education of those students in attendance at the school. If a school declines, for any reason, to notify the local board of education of those students in attendance, it shall so notify each

student's parent or legal guardian in writing, and it shall then be the duty of the parent or legal guardian to give proper notice to the local board of education..." No longer is it necessary for private schools to be approved by the State Board of Education in order to operate.

2. A Kentucky case that clarified several issues surrounding the regulation of "private" or "church" schools was decided in 1979 by the Kentucky Supreme Court. (Kentucky State Board for Elementary and Secondary Education v. Rudasill, 589 S.W. 2d 877.) The case determined that the Commonwealth of Kentucky must approve a private or parochial school for the compulsory education law unless it demonstrates the education institution in question is not a school as contemplated by the constitutional convention or does not serve to educate children to enjoy their right of suffrage. The clause in question in the Kentucky Constitution states that "nor shall any man be compelled to send his child to any school to which he may be conscientiously opposed." (Section 5, Kentucky Constitution, adopted in 1890.)

V. ATTENDANCE AREA AND ASSIGNMENT OF PUPILS

A. Generally

1. Across the nation, boards of education have broad discretion in the assignment of pupils to a specific school. Generally, courts will not substitute their judgment for that of a school board. The fact that a certain school is more conveniently located for the pupil has not in most cases been determinative of his right to attend school.

2. The Michigan Supreme Court upheld a local board's decision to reassign high school students to a local elementary school because of overcrowding and send the displaced elementary students to another school. (Hiers v. Brownell, 136 N.W. 2d 10, Mich. 1965.)

3. In 1972, the Supreme Court of Washington supported a local board's plan for busing to correct de facto segregation. The court flatly asserted that there was no substance to the parents' claim that they had a right to send their children to neighborhood schools. (Citizens Against Mandatory Busing v. Palmason, 495 P. 2d 657 Wash. 1972. Ten years later the Supreme Court

of the United States declared unconstitutional a Washington statute enacted to prevent the boards from making such assignments. Washington v. Seattle School Dist., 458 U.S. 457, 1982.)

B. In Kentucky

1. KRS 159.070 states in part that "within the appropriate school attendance area, parents or legal guardians shall be permitted to enroll for attendance their children in the public school nearest their home." This statement is obviously contradictory to the position that a board of education has broad discretion in the assignment of pupils.

2, KRS 159.070 has been challenged once in 1978. In Newburg Area Council, Inc., v. Board of Education Jefferson County (583 F 2d 827, 1978) the Court held that the statute allowing parents to enroll their children in the public school nearest their home is unconstitutional as applied to a county which is subject to a court ordered desegregation plan.

3. In 1980, the Kentucky Attorney General issued an opinion (OAG 80-394) that a local board of education has the authority to adopt a policy which will establish school attendance districts, but that school law appears to require that a school system permit parents to enroll their children in the public school nearest their home.

C. Comparability of Programs

1. All districts that operate federally funded Chapter I remedial reading and math programs must sign a list of assurances that ensure that a local district has established a comparability policy. Section 558(c) of the federal Chapter I (Part A) law states that school districts should have established:

   a. A district wide salary schedule for all instructional staff;

   b. A policy to ensure equivalence among schools in teachers, administrators, and auxiliary personnel; and

   c. A policy to ensure equivalence among schools in the provision of curriculum materials and instructional supplies.

2. The Supreme Court of North Carolina held that a girl who had been reassigned to a high school that did not offer a course in Latin and did not have a band must be allowed to attend the high school she attended as a freshman that did offer Latin and have a school band. The school board had conducted a hearing required by statute that determined that the best interests of the girl were being served and that the reassignment did not interfere with the proper administration of the school. When the board refused to reassign the girl to the original school, the parents sought relief in the Courts. (In re Reassignment of Hayes, 135 S.E. 2d 645, N.C., 1964.)

VI. ATTENDANCE ACCOUNTING IN KENTUCKY

A. Generally

1. In Kentucky the state foundation program specified how state funds will be distributed to local school districts. The foundation program funds classroom units on the basis of the number of students in average daily attendance (ADA) throughout the school year.

2. If a district has 3,000 students enrolled and 95% of the students are present every day during the school term then, the ADA for that district is 2,850. Actual funding would be computed by dividing the average daily attendance per grade level by the appropriate divisor specified by the legislature every two years.

B. Duties of Teachers

1. Since state funding is based on the number of students in ADA, then the tasks of taking attendance and keeping accurate records become extremely important.

2. Many districts in Kentucky use some type of computerized attendance procedure, but some still keep attendance manually in the state provided attendance register (referred to as the "Bird" book since it features a picture of a cardinal (the state bird) on the cover).

3. Regardless of whether districts use computerized attendance in their class or homeroom on a daily basis, attendance must be checked both in the morning and in the afternoon. Since attendance is recorded in increments of half days, attendance records for part of day must be maintained.

4. In secondary schools, attendance is usually maintained on a period by period basis. The primary purpose for this accounting, however, is not for district wide attendance accounting, but rather to keep track of students who may not "check out" from the office (i.e. those who "skip school.") Usually each secondary school establishes a procedure to monitor attendance on a period by period basis.

VII. SCHOOL DAY/TERM IN KENTUCKY

A. School Calendar (702 KAR 7:020)

1. On or before June 15 of each year, boards of education shall, upon recommendation of the superintendent, adopt a school calendar fixing the opening and closing dates of each school month, designating the dates school will be in session during each school month, and describing the days on which school will be dismissed.

2. Each school calendar shall contain a minimum of 175 teaching days (in all schools), four (4) holidays (from a lengthy list provided in KRS 2.110, but typically Thanksgiving Day, Christmas Day, Labor Day, and New Year's Day are selected) one (1) day for opening school, and one (1) day for closing schools without pupils, and four (4) days shall be designated as inservice days. Thus teachers are employed for a total of 185 days, unless on extended employment.

3. Schools must be closed on presidential election days.

4. Schools must be closed for two consecutive days for the purpose of permitting professional school employees to attend state-wide professional meetings (KEA) and for one (1) day for the regional or district professional meeting (e.g. CKEA). These days shall not be counted as part of the school term.

5. With permission districts may consider the four (4) days of inservice as 24 hours of inservice training which may be used in any part of any day (beyond the six (6) hour instructional day) with permission from the Department of Education. This practice is generally referred to as "flexible" inservice.

6. A local board may amend its calendar if necessary by submitting appropriate forms to the Department of Education.

B. "Snow Days"

1. In determining the school calendar for a district, enough teaching days shall be built in to equal the average number of full school days missed system-wide in each over the immediately preceding past five (5) years. If a district ultimately misses fewer days than the additional teaching days built into its calendar, then any such excess days may be eliminated from the calendar. (692 KAR 7:020)

2. If a school district during any school year misses a total of five (5) hours or less on all school days due to an emergency this time will not have to be made up. Any time missed on shortened school days over the five (5) hours will have to be made up. (The former practice of "snow banking" time is no longer permissible.) (702 KAR 7:010)

3. OAG 70-568 states that if conditions on the only reasonably available roads are so hazardous as to endanger the safety of the children, the superintendent of the district is authorized to declare an emergency day and/or delay school opening until hazardous conditions can be rectified.

4. In Tackett v. Unemployment Commission (630 S.W. 2d 76, Ky. 1982) the Court held that although a school calendar is modified due to snow days, if the teachers are able to work 185 days and if their incomes remain intact, they are not entitled to unemployment benefits.

C. "Calamity" Days

1. From time to time when schools are closed for extended periods of time due to inclement weather or natural disaster, a school district may petition the state board to grant "calamity" days, i.e., days that are not made up in the school calendar.

2. OAG 78-311 states that a teacher is employed for the school term established by the employing school system and even though a school term is shortened by a "calamity" day, teachers are still entitled to their full contract salary.

D. Six-Hour School Days (702 KAR 7:010 Section (5))

1. Each school day shall consist of at least (6) hours of actual organized and supervised instruction, exclusive

of lunch periods and recesses. Kindergarten, readiness classes, first grade classes, and classes for the handicapped may be permitted to have a school day less than six (6) hours under policies adopted by the local board and approved by the State Board of Education.

2. The following are the only approvable activities that may be conducted during the six (6) hour school day:

    a. Courses and activities included in the "Program of Studies for Kentucky Schools, Grades K-12;"

    b. Enrichment courses approved by the State Board of Education;

    c. Experimental courses or programs approved by the State Board of Education;

    d. Co-curricular activities, such as club meetings and assemblies, as long as such are related directly to the instructional program and are scheduled so as to minimize absences from classroom instruction; and

    e. Homeroom in the morning and afternoon for checking attendance. These periods shall not exceed ten (10) minutes per homeroom or twenty (20) minutes daily.

3. Many questions have arisen about the five categories identified in Section (2) above. Generally speaking, districts have decided that pep rallies are not co-curricular activities. Thanksgiving assemblies, however, are typically considered co-curricular since each district is expected to offer character education and teach history. If a school day is longer than six (6) hours, then a school may conduct activities that fall outside of the five categories in Section (2) above such as pep rallies.

SUPPLEMENT TO UNIT TWELVE

Attendance Cases

The situations described below are not taken directly from actual court cases, but are based on real cases.

1. Fuller

Jane Fuller is a six year old girl living in Harlan, Kentucky. Her father and mother own and operate a 150 acre apple orchard. Jane has been helping harvest the apple crop as well as assisting her parents in operating their small roadside produce market since she was four years old. She has already learned to count and to make change accurately. Her parents are proud of her and hope that one day Jane will take over management of the orchard.

Mike, Jane's brother, is 14 years old. He is severely retarded and has been enrolled in some type of special education class since he entered school when he was six. His IQ has been measured to be 53, 57, and 50 on three different occasions. Mike, who is very strong for his age, works very hard around the orchard. He picks apples, loads them onto trucks, places them in the apple washer, helps make apple cider, and performs other simple, but laborious, tasks very well. The Fullers are very proud of Mike also and hope he will be able to work and remain on the farm for the rest of his life.

Mr. and Mrs. Fuller feel that Mike is no longer benefiting from his LD class at school and his teacher agrees that he is perfectly capable of becoming a full-time productive worker in the orchard. They want the board of education in Harlan County to exempt him from the compulsory attendance statute (KRS 159.010) that requires him to attend school until age 16.

What right do Jane and Mike have to attend state supported schools in Kentucky?

What right does Kentucky have to compel that Jane and Mike attend school until age 16?

Do you think the board of education has the authority to exempt Mike from attending school at age 14?

Should the board of education have this authority?

If the board could not or would not exempt Mike from attending school what would likely happen if the Fullers kept Mike at home anyway?

2. Schmidt

Thomas Schmidt lives in Reedsburg, Wisconsin, in an Amish settlement. He is 14 years old and has been a straight "A" student at Reedsburg Junior High School and has also won several agricultural awards in the county and state fair. The Amish community in which he lives is virtually self-sufficient. His father, Mr. Schmidt, breeds horses and operates a small blacksmith shop. He expects Thomas to take over the shop when he is older.

Now that Thomas is 14, Mr. Schmidt feels that he should become his fulltime apprentice. In addition, Mr. Schmidt finds that the values and programs offered in Reedsburg High School are in sharp conflict with the fundamental style of life mandated by the Amish religion.

What right does Thomas have to attend state supported schools in Wisconsin?

What right does Wisconsin have to compel that Thomas attend school until age 16?

Would the answer to the questions above be the same or different if Thomas lived in Kentucky instead of Wisconsin?

Remembering Mr. Schmidt's feelings, should Thomas be exempted from completing two more years of schooling?

If Thomas were 10 years old would your opinion be different?

If one believes that the welfare of society takes precedence over religious preferences, should Thomas be allowed to leave school at age 14?

3. Smith

Jeanna Smith lives in Fort Mitchell, Kentucky, and has attended a parochial elementary school for eight years. Since Jeanna has three younger brothers and sisters in elementary school and since tuition for high school is much higher, Jeanna's parents have decided that she must attend the public school. They want her, if possible, to continue to have some sort of religious training while she is attending school. Consequently, they have approached the superintendent about the possibility of Jeanna attending two one-half hour religious classes a week at the nearby parochial school. (The parochial school is within walking distance.)

Do you think it is possible for the superintendent to grant this request?

Would granting such a request violate the intent of a compulsory attendance law?

4. Johnson and Reed

Both the Johnson and Reed families are Seventh Day Adventists and live in Cadiz, Kentucky. The Johnsons have three school age children and the Reeds have four school age children. There is no Seventh Day Adventist Church in Cadiz; nor is there a denominational school to which either family wishes to send their children. Mr. Reed attended college for three years and was an education major. Mrs. Johnson graduated from a community college with an associate degree in bookkeeping. Mrs. Johnson and Mr. Reed feel that they can provide adequate instruction for their children - both academic and religious - until they are old enough to attend high school.

Should these families have the right to establish their own school?

Can you think of several reasons why home instruction might not comply with the compulsory attendance law?

5. Frederick

The Frederick's children, Robert and Tony, were attending an elementary school near their home in Detroit, Michigan. Robert was in the 5th grade and Tony was in the 2nd grade. The school board adopted a reassignment plan that would send grades 4, 5, and 6 at Robert and Tony's elementary school to another school 10 miles away. The 4th, 5th, and 6th grade classrooms were used to house overflow students from the adjacent high school. The Fredericks were upset since Robert walked his younger brother to school each day, and, in addition, they felt that housing high school students in a building designed for elementary students was inappropriate.

Do you think the school board should have the sole authority to make such pupil assignment decisions?

Do you think the Fredericks have any legal recourse at this point?

6. Jenks

Tim Jenks, a sophomore, was enrolled in Wilkes Central High in Wilkesboro, N.C. He had completed two years of Latin and was a member of the band. Tim was reassigned his junior year to East High School, another high school in the Wilkes County District. East High did not offer a third year of Latin; nor did it have a band. Tim planned to go to the University of North Carolina which required two years in two foreign languages or three years of Latin. Also, Tim hoped to play in the Tar Heel Marching Band at UNC. His parents requested that he be allowed to graduate from Wilkes Central. The board refused.

How does Tim's situation compare to the Frederick's mentioned above? i.e. are they alike or different?

Do you think the Jenks have any legal recourse at this point?

COMMONWEALTH OF KENTUCKY

IMMUNIZATION CERTIFICATE

(Required of each child for enrollment in public or private school.)

Name of Student ______________________ Birthdate ______________
(Last) (First) (Middle)

Name of Parent or Guardian ______________________________

Address ____
(Street) (City) (State) (Zip Code)

THIS IS TO CERTIFY THAT THE ABOVE NAMED CHILD HAS COMPLETED IMMUNIZATION REQUIREMENTS AS STIPULATED BELOW:

DATES ADMINISTERED

DIPHTHERIA AND TETANUS VACCINES* – THREE (3) TO FIVE (5) DOSES** ______ ______ ______ ______ ______
ORAL POLIO VACCINE – THREE (3) TO FOUR (4) DOSES** ______ ______ ______ ______
MEASLES VACCINE – ONE (1) DOSE ______
RUBELLA VACCINE – ONE (1) DOSE ______
M/M/R - - - - - - - - - - - - - - - -ONE (1) DOSE - - - - - - - - ______

*DPT, DT and/or Td.
**Dependent upon age at which immunizations were begun.

THIS CERTIFICATE IS VALID THROUGH THE SCHOOL YEAR ENDING 19 ______ Once this certificate is no longer valid, the immunity status of the child must be re-evaluated, and a new certificate issued.

Signature of Physician or Health Dept. ______________________ (Date) ______________

This Certificate should be presented to the school in which the child intends to enroll and should be retained by the school and filed with the chil school health record.

COMMONWEALTH OF KENTUCKY

SCHOOL IMMUNIZATION LAW

CERTIFICATE OF RELIGIOUS EXEMPTION

Name of Student ______________________ Birthdate ______________

Name of Parent or Guardian ______________________________

Address ____
(Street) (City) (State) (Zip Code)

Signature of Parent or Guardian ______________________ Date ______________

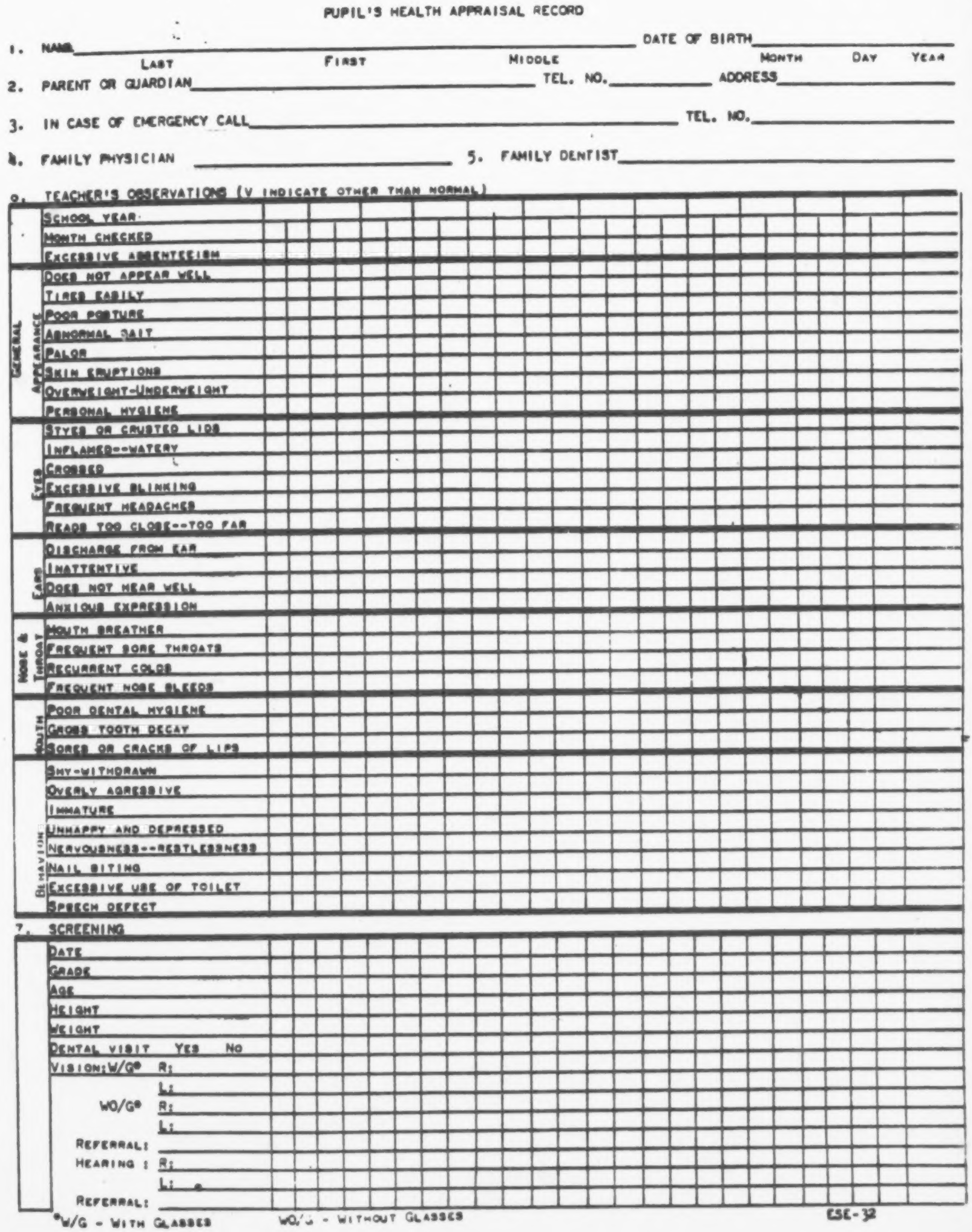
RELIGIOUS EXEMPTION – THE ABOVE NAMED STUDENT IS HEREBY GRANTED A RELIGIOUS EXEMPTION ON THE BASIS OF A WRITTEN SWORN STATEMENT BY THE PARENTS OR GUARDIANS OBJECTING TO THE IMMUNIZATION OF SUCH STUDENT ON RELIGIOUS GROUNDS.

______________________ ______________
(Signature of School Official) (Title)

______________________ ______________
(Address) (Date)

This certificate should be presented to the school in which the child intends to enroll and should be retained by the school and filed with the child's school health record.

Sample Health Record Form



PUPIL'S HEALTH APPRAISAL RECORD

1. NAME________________________________ DATE OF BIRTH________________
   LAST FIRST MIDDLE MONTH DAY YEAR
2. PARENT OR GUARDIAN________________ TEL. NO.__________ ADDRESS__________
3. IN CASE OF EMERGENCY CALL________________________ TEL. NO.__________
4. FAMILY PHYSICIAN________________ 5. FAMILY DENTIST________________

6. TEACHER'S OBSERVATIONS (V INDICATE OTHER THAN NORMAL)

	SCHOOL YEAR	
	MONTH CHECKED	
	EXCESSIVE ABSENTEEISM	
GENERAL APPEARANCE	DOES NOT APPEAR WELL	
	TIRES EASILY	
	POOR POSTURE	
	ABNORMAL GAIT	
	PALOR	
	SKIN ERUPTIONS	
	OVERWEIGHT-UNDERWEIGHT	
	PERSONAL HYGIENE	
EYES	STYES OR CRUSTED LIDS	
	INFLAMED--WATERY	
	CROSSED	
	EXCESSIVE BLINKING	
	FREQUENT HEADACHES	
	READS TOO CLOSE--TOO FAR	
EARS	DISCHARGE FROM EAR	
	INATTENTIVE	
	DOES NOT HEAR WELL	
	ANXIOUS EXPRESSION	
NOSE & THROAT	MOUTH BREATHER	
	FREQUENT SORE THROATS	
	RECURRENT COLDS	
	FREQUENT NOSE BLEEDS	
MOUTH	POOR DENTAL HYGIENE	
	GROSS TOOTH DECAY	
	SORES OR CRACKS OF LIPS	
BEHAVIOR	SHY-WITHDRAWN	
	OVERLY AGRESSIVE	
	IMMATURE	
	UNHAPPY AND DEPRESSED	
	NERVOUSNESS--RESTLESSNESS	
	NAIL BITING	
	EXCESSIVE USE OF TOILET	
	SPEECH DEFECT	

7. SCREENING

DATE		
GRADE		
AGE		
HEIGHT		
WEIGHT		
DENTAL VISIT	YES NO	
VISION: W/G*	R:	
	L:	
WO/G*	R:	
	L:	
REFERRAL:		
HEARING:	R:	
	L:	
REFERRAL:		

*W/G - WITH GLASSES WO/G - WITHOUT GLASSES

ESE-32

8. PREVIOUS OR EXISTING DISEASES & CONDITIONS	9. FAMILY HISTORY OF TUBERCULOSIS EPILEPSY, DIABETES, OTHER	10. IMMUNIZATIONS AND TESTS	SERIES (DATE)				BOOSTER (DATE)	
ALLERGIES		DPT						
CONVULSIONS		TD	■					
DIABETES		POLIO						
POLIO		MEASLES						
RHEUMATIC FEVER		SMALLPOX						
MEASLES		TB TEST READING						
OTHER		OTHER						

11. PHYSICIAN'S EXAMINATIONS AND RECOMMENDATIONS

DATE	

12. TEACHER'S AND NURSE'S NOTES

DATE	

D - DIPTHERIA P - PERTUSSIS T - TETANUS

Teachers should be familiar with health problems of each of their students - not just their homeroom students.

JESSAMINE COUNTY SCHOOLS ABSENTEE REPORT FORM

Name of student ______ M/F M
School ______ Date of Birth 7-12 ______ Age 13 Grade 6
Name of parent or guardian ______
Home address ______
______ Home Phone —
Work address —
______ Work Phone —

Please show absences with a check (I) and tardies with a (T). Circle invalid absences or tardies. (Ⓘ) (Ⓣ)

	M	T	W	R	F	M	T	W	R	F	M	T	W	R	F	M	T	W	R	F	M	T	W	R	F
Aug				1	2	5	6	7	8	9	12	13	14	15	16	19	20	21	22	23	26	27	28	29	30
Sep	2	3	4	5	6 I	9	10	11	12	13	16 Ⓘ	17 Ⓘ	18	19	20	23 I	24 Ⓣ	25	26	27 I					
Oct		1	2	3	4	7	8	9	10 I	11 I	14	15	16	17	18	21 Ⓘ	22 Ⓘ	23	24	25	28	29	30	31 I	
Nov					1	4	5	6	7	8	11	12	13 Ⓘ	14	15	18	19 I	20	21	22	25 Ⓘ	26 Ⓘ	27	28	29
Dec	2	3	4	5	6	9 I	10 Ⓘ	11 Ⓘ	12 Ⓘ	13 Ⓘ	16	17	18	19	20	23	24	25	26	27	30	31			
Jan			1	2	3 Ⓘ	6	7 I	8 I	9	10	13 I	14	15	16	17	20	21	22	23	24	27	28	29	30	31
Feb						3	4	5	6	7	10	11	12	13	14	17	18	19	20	21	24	25	26	27	28
Mar	3	4	5	6	7	10	11	12	13	14	17	18	19	20	21	24	25	26	27	28	31				
Apr		1	2	3	4	7	8	9	10	11	14	15	16	17	18	21	22	23	24	25	28	29	30		
May				1	2	5	6	7	8	9	12	13	14	15	16	19	20	21	22	23	26	27	28	29	30
Jun	2	3	4	5	6	9	10	11	12	13	16	17	18	19	20	23	24	25	26	27	30				

1. Has a phone call been made or a letter sent regarding the first truancy?
Yes X No ___ (phone to neighbors)

2. visit Has a phone call been made or a letter sent regarding the second truancy?
Yes X No ___ What action has been taken by the counselor or social worker regarding the second truancy? The principal has been to the home to talk to Mrs. ______

Do you want a Final Notice sent after this second truancy? Yes X No ___

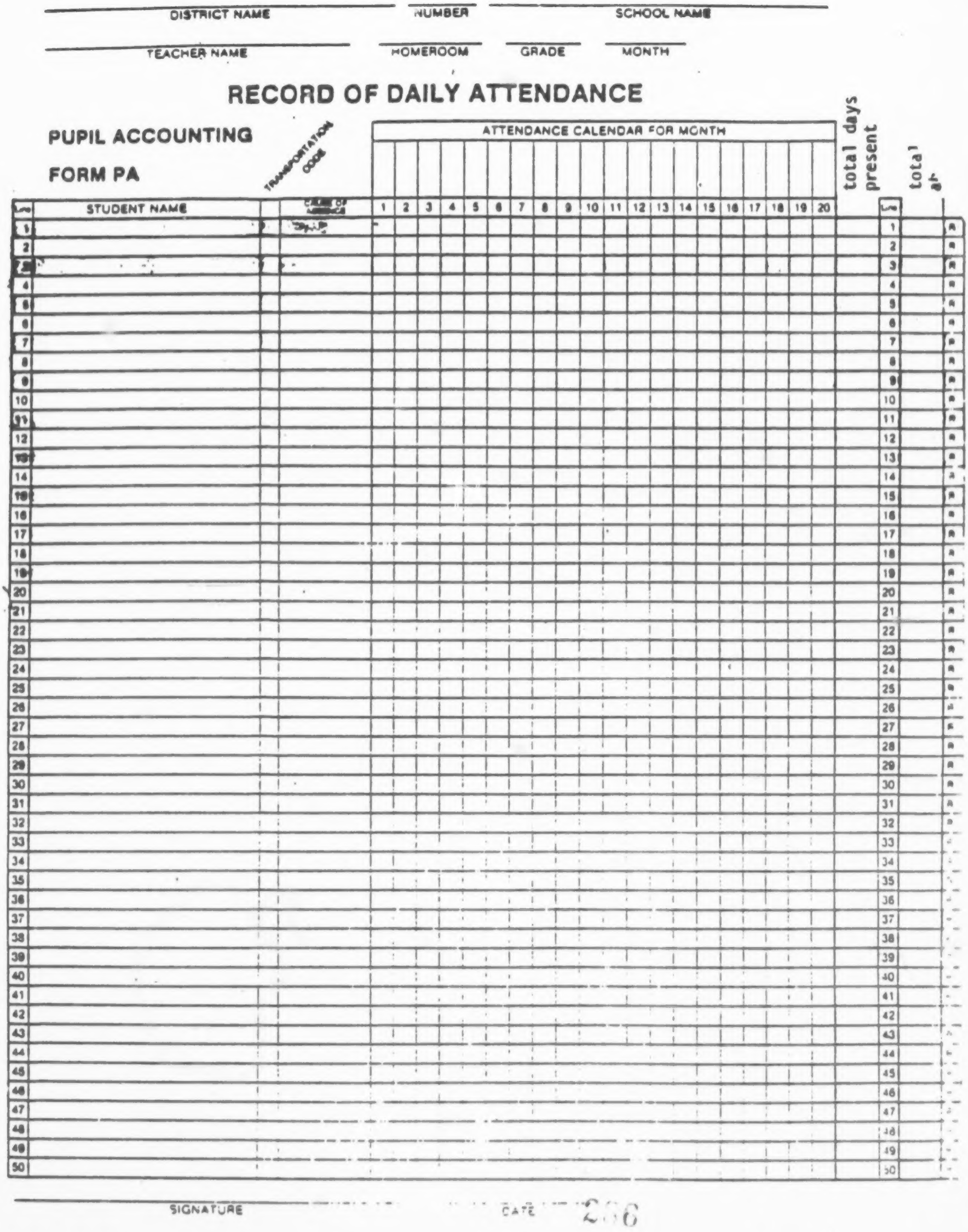
3. If this report reflects a third truancy a Final Notice, if not previously mailed, will be sent. Please share what action was suggested in the scheduled conference with the parent. Parent feels like the child needs to stay home when he "feels ill." However the child's work is failing, no excuses are brought in and no effort is made to make it up.

4. If this report reflects a fourth truancy, court action will be initiated.

Homeroom teachers name ______

Principal's signature ______ Date 1/13/86

Please photo copy, then sign and date the photo copy and send it to the Director of Pupil Personnel. Keep the unsigned original for updates.



DISTRICT NAME ____ NUMBER ____ SCHOOL NAME ____

TEACHER NAME ____ HOMEROOM ____ GRADE ____ MONTH ____

RECORD OF DAILY ATTENDANCE

PUPIL ACCOUNTING

FORM PA

ATTENDANCE CALENDAR FOR MONTH

	STUDENT NAME	TRANSPORTATION CODE	CAUSE OF ABSENCE	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20	total days present		total	
1																									1		
2																									2		
3																									3		
4																									4		
5																									5		
6																									6		
7																									7		
8																									8		
9																									9		
10																									10		
11																									11		
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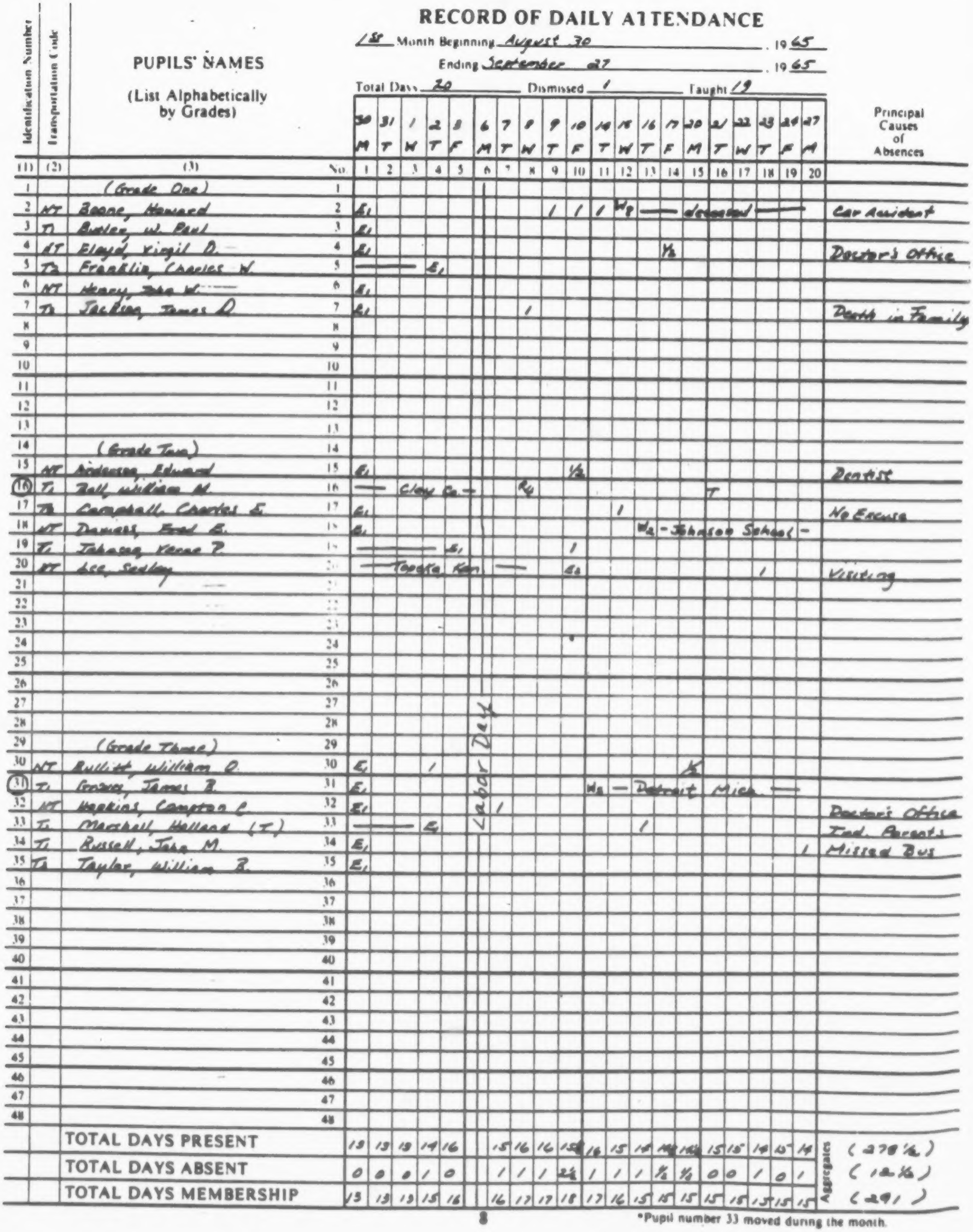
44																									44		
45																									45		
46																									46		
47																									47		
48																									48		
49																									49		
50																									50		

SIGNATURE ____ DATE ____

Jessamine County report sheet on student attendance. Information is transferred to a computer.

Sample pages from the infamous "Bird" Book; so called because of the picture of the cardinal on the front cover.



RECORD OF DAILY ATTENDANCE

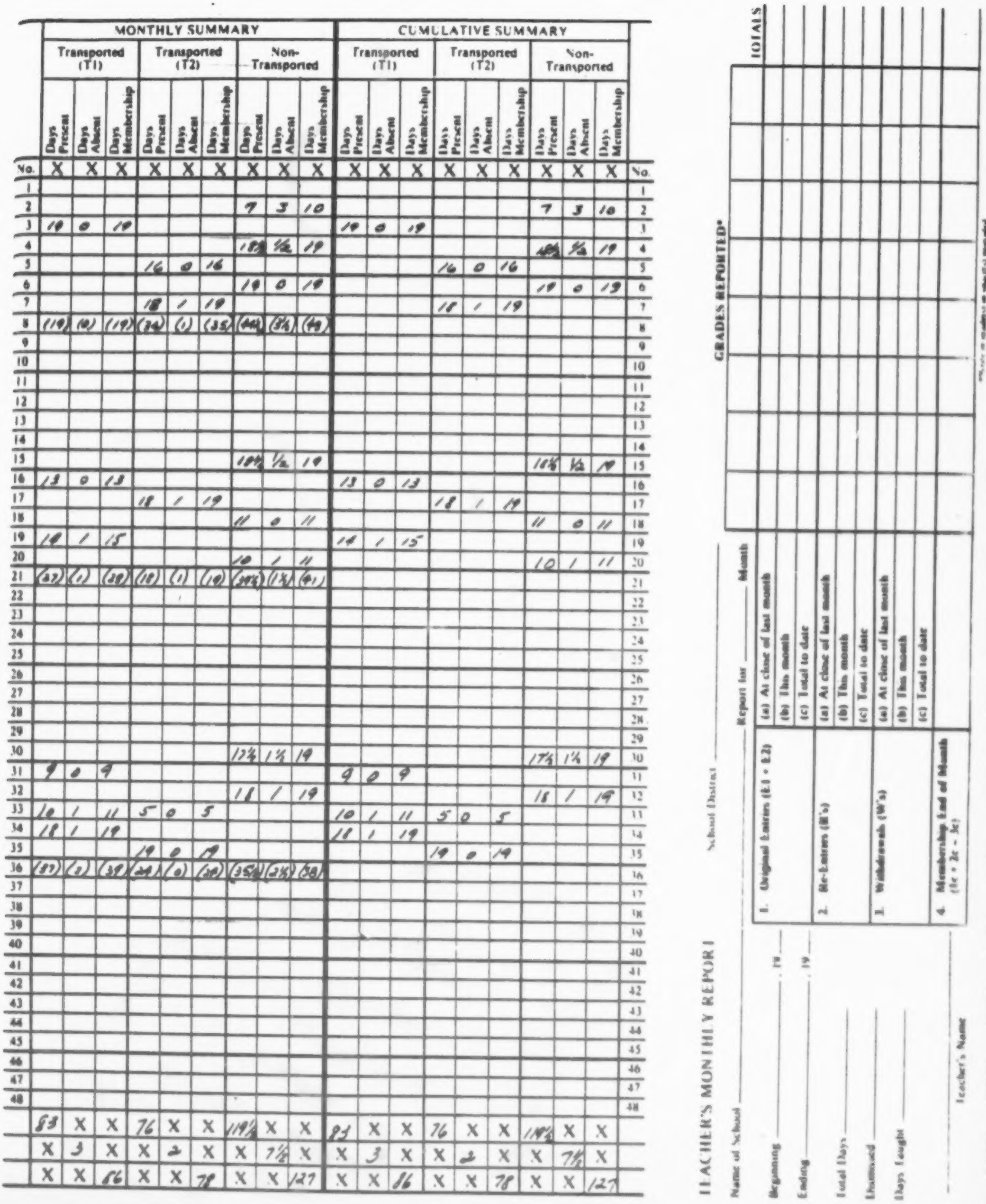
1st Month Beginning August 30, 1965
Ending September 27, 1965
Total Days 20 Dismissed 1 Taught 19

Identification Number	Transportation Code	PUPILS' NAMES (List Alphabetically by Grades)		30 M	31 T	1 W	2 T	3 F	6 M	7 T	8 W	9 T	10 F	14 T	15 W	16 T	17 F	20 M	21 T	22 W	23 T	24 F	27 M	Principal Causes of Absences
(1)	(2)	(3)	No.	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20	
1		(Grade One)	1																					
2	NT	Boone, Howard	2	E_1								/	/	/	W_8 —— deceased ——									Car Accident
3	T1	Butler, W. Paul	3	E_1																				
4	NT	Floyd, Virgil D.	4	E_1													½							Doctor's Office
5	T2	Franklin, Charles W.	5	———			E_1																	
6	NT	Henry, John W.	6	E_1																				
7	T2	Jackson, James D.	7	E_1							/													Death in Family
8			8																					
9			9																					
10			10																					
11			11																					
12			12																					
13			13																					
14		(Grade Two)	14																					
15	NT	Anderson, Edward	15	E_1									½											Dentist
⑯	T1	Bell, William M.	16	— Clay Co. —							R_4								T					
17	T3	Campbell, Charles E.	17	E_1											/									No Excuse
18	NT	Daniels, Fred E.	18	E_1												W_2 - Johnson School -								
19	T1	Johnson, Verna P.	19	———				E_1					/											
20	NT	Lee, Sedley	20	— Topeka, Kan. —									E_2								/			Visiting
21			21																					
22			22																					
23			23																					
24			24																					
25			25																					
26			26																					
27			27						Labor Day															
28			28																					
29		(Grade Three)	29																					
30	NT	Bullitt, William O.	30	E_1			/											½						
㉛	T1	Conway, James B.	31	E_1										W_2 — Detroit Mich. —										
32	NT	Hopkins, Compton C.	32	E_1						/														Doctor's Office
33	T1	Marshall, Holland (T)	33	———			E_1									/								Ind. Parents
34	T1	Russell, John M.	34	E_1																			/	Missed Bus
35	T2	Taylor, William B.	35	E_1																				
36			36																					
37			37																					
38			38																					
39			39																					
40			40																					
41			41																					
42			42																					
43			43																					
44			44																					
45			45																					
46			46																					
47			47																					
48			48																					
		TOTAL DAYS PRESENT		13	13	13	14	16		15	16	16	15½	16	15	14	14½	14½	15	15	14	15	14	Aggregates (278½)
		TOTAL DAYS ABSENT		0	0	0	1	0		1	1	1	2½	1	1	1	½	½	0	0	1	0	1	(12½)
		TOTAL DAYS MEMBERSHIP		13	13	13	15	16		16	17	17	18	17	16	15	15	15	15	15	15	15	15	(291)

8

*Pupil number 33 moved during the month.

Since the advent of computerized pupil accounting some teachers no longer need to fill out the "Bird" Book.



	MONTHLY SUMMARY									CUMULATIVE SUMMARY									
	Transported (T1)			Transported (T2)			Non-Transported			Transported (T1)			Transported (T2)			Non-Transported			
	Days Present	Days Absent	Days Membership	Days Present	Days Absent	Days Membership	Days Present	Days Absent	Days Membership	Days Present	Days Absent	Days Membership	Days Present	Days Absent	Days Membership	Days Present	Days Absent	Days Membership	
No.	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	No.
1																			1
2							7	3	10							7	3	10	2
3	19	0	19							19	0	19							3
4							18½	½	19							18½	½	19	4
5				16	0	16							16	0	16				5
6							19	0	19							19	0	19	6
7				18	1	19							18	1	19				7
8	(19)	(0)	(19)	(34)	(1)	(35)	(44½)	(3½)	(48)										8
9																			9
10																			10
11																			11
12																			12
13																			13
14																			14
15							18½	½	19							18½	½	19	15
16	13	0	13							13	0	13							16
17				18	1	19							18	1	19				17
18							11	0	11							11	0	11	18
19	14	1	15							14	1	15							19
20							10	1	11							10	1	11	20
21	(27)	(1)	(28)	(18)	(1)	(19)	(39½)	(1½)	(41)										21
22																			22
23																			23
24																			24
25																			25
26																			26
27																			27
28																			28
29																			29
30							17½	1½	19							17½	1½	19	30
31	9	0	9							9	0	9							31
32							18	1	19							18	1	19	32
33	10	1	11	5	0	5				10	1	11	5	0	5				33
34	18	1	19							18	1	19							34
35				19	0	19							19	0	19				35
36	(37)	(2)	(39)	(24)	(0)	(24)	(35½)	(2½)	(38)										36
37																			37
38																			38
39																			39
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42																			42
43																			43
44																			44
45																			45
46																			46
47																			47
48																			48
	83	X	X	76	X	X	119½	X	X	83	X	X	76	X	X	119½	X	X	
	X	3	X	X	2	X	X	7½	X	X	3	X	X	2	X	X	7½	X	
	X	X	86	X	X	78	X	X	127	X	X	86	X	X	78	X	X	127	

TEACHER'S MONTHLY REPORT

School District ____________

Name of School ____________ Report for ________ Month

Beginning ____________, 19___

Ending ____________, 19___

Total Days ____________

Dismissed ____________

Days Taught ____________

____
Teacher's Name

		GRADES REPORTED*								TOTALS
1. Original Entries (E1 + E2)	(a) At close of last month									
	(b) This month									
	(c) Total to date									
2. Re-Entries (R's)	(a) At close of last month									
	(b) This month									
	(c) Total to date									
3. Withdrawals (W's)	(a) At close of last month									
	(b) This month									
	(c) Total to date									
4. Membership End of Month (1c + 2c - 3c)										

Kentucky Department of Education
Alice McDonald, Superintendent of Public Instruction
Capital Plaza Tower, Frankfort, Kentucky 40601

August 30, 1984

Dr. Timothy Thomas, Director
Thomas Academy
402 Akers Drive
Wilmore, KY 40390

Dear Dr. Thomas:

This is to certify that the Department of Education has received the required documents for approval of Thomas Academy for the purpose of the exemption of students from the compulsory attendance law as provided in KRS 159.030. Thomas Academy has met the requirements of 704 KAR 6:010. You are reminded that this regulation requires that you furnish the superintendent of the school district in which the children reside a list of the names of those children in regular attendance at Thomas Academy no later than October 1 of each year.

Please utilize the nine-digit number and the school name, as shown, in all correspondence and reports to the Department.

County #	District #	School #	School Name
057	281	110	Thomas Academy

This approval in no way constitutes accreditation or approval of the academic program by the Department of Education, as accreditation as such cannot legally be required. 704 KAR 6:010 provides that, "non-public schools that voluntarily comply with the State Board of Education standards for accreditation may, upon request, receive a statement to that effect from the State Board of Education."

Sincerely,

James Fouche'
Associate Superintendent for Instruction

cc: Susan Goins
Jo Ann Akers
Charles Calloway
Audrey Carr
Betty Hageman
Local DPP

Small home school with state approval.

Note: Name appears in official Kentucky School Directory 1985-86

The Thomas Academy

Directors:
Timothy L. Thomas, Ed.D.
Joyce Thomas, B.A.

402 Akers Drive
Wilmore, Kentucky 40390
606-858-4596

September 20, 1984

Dr. Donald Martin
Superintendent of Schools
Jessamine County
Nicholasville, Kentucky

Dear Dr. Martin:

This is simply to inform you that we have two students enrolled in our school. They are:

Katy Beth	Coppedge	Grade 7
Sarah Beth	Thomas	Grade 7

Please refer this information to the appropriate officer in your administration.

Thank you for your interest and cooperation.

Sincerely yours,

Timothy L. Thomas

Timothy L. Thomas

Nicholasville, Ky 40356
Oct 28, 1985

Dear Mr. Beaty,

Here is the written notice you requested in relationship to our son Robbie. We are withdrawing him from the public school system and will be teaching him at home. He will be following a course of study that should he decide not to return to the public school system next year, he'll be able to take a GED test when he meets the qualifications. Not only will he be studying the five areas of writing skills, social studies, science, reading and mathematics but I plan to include public speaking and vocational training in areas of accounting and public relations. I understand that he needs six hours a day of schooling and have set up a Schedule to provide such. I thank you for the co-operation and information you gave me last Thursday.

Sincerely,

ROLE PLAY

Background

On September 10, 1987, the Principal of Jessamine County High School (Mr. Conyers) received a telephone call from Richard Roe, father of Jennifer Roe, a high school student, requesting that Jennifer be excused for 14 school days, from September 30 through October 19, to attend church Holy Days and Festivals. Mr. Conyers approved 5 days of excused absence, as permitted by school board policies.

When Mr. Roe was not satisfied with this action, Mr. Conyers told him to put his request in writing and that he would refer it to the superintendent (Dr. Martin).

Over the next several days Dr. Martin received or sent the attached communications. He also received a telephone call from one of Jennifer's teachers, Ms. Jefferson, who has received numerous awards for her teaching excellence. Ms. Jefferson had two objections to granting 14 days of excused absences: (1) It was educationally unsound, in that the educational value of participating in classroom discussions and related activities cannot be matched by any "make-up" activities; (2) Conscientious teachers are already stretching themselves to the limits of available time and physical and mental energy and it is unreasonable to expect them to prepare and grade the amount of make-up work that would be involved in 14 days of excused absences.

Setting

Dr. Martin has asked a group to meet with him to discuss the advisability of recommending a change in school board policy. Attending this meeting are:

Dr. Martin: Superintendent of Schools
Mr. Conyers: High School Principal
Ms. Jefferson: Teacher
Mr. Roe: Parent
Ms. Doe: School Board Attorney
Others: As needed

Sept. 13, 1987

Mr. Conyers.

This letter is in response to our telephone conversation of Sept. 10th. Requesting Jennifer to be excused on Sept. 24th and Sept 30th Through Oct. 19th. for attendance of Church Holy Days and Festivals. A total of 14 School days. I request that Jennifer make up any assignments or test applying to this grading period, and prefer that she take some assignments with her. If you have any questions feel free to call me at home (887-1933) or work (233-4511 EXT. 4454).

Thank You,
Richard Roe

JESSAMINE COUNTY SCHOOL SYSTEM

[redacted]

POST OFFICE BOX 186 · EAST MAPLE STREET
NICHOLASVILLE, KENTUCKY 40356
(606) 885-4179

September 17, 1987

Mr. Richard Roe
13 Brookside Drive
Nicholasville, KY 40356

Dear Mr. Roe:

Enclosed you will find a copy of a memorandum I recently sent to our principals concerning absences for religious purposes. Also attached is a page from the book, Kentucky School Laws, that lists the statutes quoted in the memorandum.

As I am sure you are aware, school attendance is important; there is no way that the classroom experience can be made up. However, in recognition of unusual circumstances the Jessamine County Code of Conduct allows the principal to excuse up to five days for "other" special reasons. Apparently Mr. Conyers has approved your request for these five days. Beyond five days, absences will have to be recorded as unexcused.

Sincerely,

Donald L. Martin, Jr., Ed.D.,
Superintendent

DLM/db
Enclosures

JESSAMINE COUNTY SCHOOL SYSTEM

POST OFFICE BOX 186 - EAST MAPLE STREET
NICHOLASVILLE, KENTUCKY 40356
(606) 885-4179

September 14, 1987

MEMO

TO: Principals

FROM: Don Martin

RE: Interpretation of Attendance Regulations Relative to Students Attending Religious Retreats

The question has been asked about how absences should be handled when students miss school while attending a religious retreat. KRS 158.200 states that boards of education may provide for moral instruction of pupils by (1) surveying all pupils attending the public schools to ascertain those pupils who desire moral instruction (KRS 158.210) and, (2) fixing one (1) day each week for pupils who desire to receive moral instruction to be excused for at least one (1) hour to attend their respective places of worship to receive moral instruction in accordance with the pupil's religious faith or preference (KRS 158.220). In 1975 the Attorney General's office clarified these statutes in an official opinion OAG 75-218 that stated: "public schools cannot release pupils for a day at a time for moral instruction under the statute which allows release for only one hour per week."

The Jessamine County Code of Conduct in Part Two, Section I-E(1)(c) allows the school principal to excuse absences for other valid reasons not to exceed five (5) days per school year. Under this regulation five days of a religious retreat could be excused.

In the event a student missed more than 20 days (or 10 a semester for certain high school students), the appeals committee would have to consider the reasons for all absences in making a recommendation concerning promotion or non-promotion.

Ralph K. Helge & Associates
Attorneys at Law
Union Bank Building, Suite 714
201 South Lake Avenue
Pasadena, California 91101
(818) 304-4000

September 17, 1987

Dr. Donald Martin
Superintendent and
Chairman of the Board
Jessamine County Board of Education
P. O. Box 186
Nicholasville, Kentucky 40356

Dear Dr. Martin:

This letter will introduce our firm as general counsel for the Worldwide Church of God, the headquarters of which is located in Pasadena, California.

We are writing you regarding difficulties which are being encountered by Church members in obtaining excused absences for their children and the opportunity to make up missed assignments and tests for the purpose of observing certain Holy Days of the Church. It is our understanding that their children have been granted 5 days excused absences with any remaining days being unexcused. They will be given no credit for the unexcused days and will not be able to make up tests or assignments on these days.

Following is a list of the children involved and the schools they attend:

Name	School
	Warner Elementary School
	Jessamine County Middle School
	Jessamine County Middle School
	Nicholasville Elementary School
	Jessamine County Middle School
	Warner Elementary School
	Nicholasville Elementary School
	Jessamine County High School

The facts regarding the absences of said Church members' children are as follows: In obedience to the Biblical commands and doctrines of the Church, the members of the Worldwide Church of God and their children keep the seven annual Holy Days mentioned in Leviticus 23, each of these days beginning at sunset.

The annual Holy Days are commanded Holy convocations which all members of the Church are required to observe by refraining from secular labor and entertainment activities, by attending worship service, and by devoting the period to worship, spiritual study, and prayer. The Church teaches absolute adherence to these days.

The particular annual Holy Days which the Worldwide Church of God observes are, in some respects, identical with those observed by Orthodox Judaism, with minor variations due to the theological construction of the Hebrew calendar. The Church's Holy Days, and the dates of the same for 1987-88 school year (the dates for the other years would, of course, be different), are listed below for your consideration:

1. The Feast of Trumpets (Thursday, September 24, 1987)
2. Day of Atonement (Saturday, October 3, 1987)
3. First Day of Feast of Tabernacles (Thursday, October 8, 1987)
4. Last Great Day (Thursday, October 15, 1987)
5. First Day of Feast of Unleavened Bread or Passover (Saturday, April 2, 1988)
6. Seventh Day of Feast of Unleavened Bread or Passover (Friday, April 8, 1988)
7. Day of Pentecost (Sunday, May 22, 1988)

During the period of the Feast of Tabernacles, all members of the Church are commanded to attend an eight-day convocation at specific regional locations throughout the world. Most of the problems encountered by Church members concern the observance of the Feast of Tabernacles.

In dealing with these cases throughout the United States, Dr. Martin, it has been our experience that school officials may not have understood and been fully aware of the commanded nature of the obligation of the Church members and their children in regard to the foregoing mentioned Holy Days. The Church urges its members to make every effort to cooperate with school officials in working these matters out in the best way possible, including talking to teachers, principals, and other school officials in order to obtain their children's assignments ahead of time to make up any tests or back work missed during their absence. Our experience in these matters has been that the vast majority of school officials have been exceptionally cooperative and helpful.

We would respectfully suggest, Dr. Martin, that any policy to arbitrarily deny members of the Worldwide Church of God and their children excused absences for their commanded Holy Days or to deny them make up work, tests, lower their grades, or otherwise penalize them, would be unfair and inequitable. We would also respectfully request reconsideration of this matter by yourself in the light of the right afforded members of the Church and their children under the equal protection clause of the Fourteenth Amendment, the freedom of religion clause of the First Amendment, and numerous Supreme Court decisions.

Under the above-cited authorities, we feel it would be totally discriminatory to grant Worldwide Church of God children any less consideration than is granted to children of other faiths. As for example, what privileges or penalties are imposed upon children who are out of school for the Christmas period? For the Good Friday and Easter season? For Thanksgiving? For Rosh Hashanah or Yom Kippur? For the Passover? Do those children receive the same penalty as the children under consideration, or are said periods excused absences? Any variation or difference in application of policy would constitute a violation of the authorities cited above.

We realize, of course, that the Christmas, Thanksgiving, and Easter periods normally coincide with scheduled school holidays. But we would suggest that this is only because said holidays are observed by the majority. It is certainly not because said holidays are entitled to any greater deference under the Constitution or laws of the country.

As a consequence, would you please grant the children involved in this case the right to be excused for their particular Holy Days and the right to make up any missed assignments or tests without penalty. I am sure you will agree with us that the innocent children should not be needlessly penalized by denial of the foregoing opportunity when there is no compelling interest of the local school to be served in doing so.

I realize this may require a Board meeting and a change in your attendance policy, therefore, for your information suggested

SUGGESTED WORDING

A school district shall excuse a student from attending school for the purpose of observing religious holy days if before the absence the parent, guardian, or person having custody or control of the student submits a written request for the excused absence. The school district shall excuse a student under this provision for the days on which the religious holy days are observed and for the days on which the student must travel to and from the site where he will observe the holy days. A student whose absence is excused under this provision shall not be penalized for such absence and shall be allowed a reasonable time to make up school work missed on those days. In accordance with the customary and generally applicable educational practices in the school district, the school district may appropriately respond if the student fails to satisfactorily complete such school work.

vb61215a

wording similar to policies adopted in other states and school districts is attached.

It is not our intention or desire at this point to in any way challenge the school's policy regarding their treatment of other religious Holy Days, but only to bring to your attention the fact that the children of members of the Worldwide Church of God should have the same privilege.

For your information, we are also enclosing a copy of a recent federal court decision in which the court held that members of the Worldwide Church of God and their children have the right to be absent from school for their Holy Days and not be penalized therefor. We would suggest that this decision be submitted to the School Board and to their legal counsel so that they may confirm its applicability to the children involved here.

In view of the enclosed court decision, we would greatly appreciate your informing us what action, if any, the school district plans to take in regard to accommodating the religious Holy Days of said Church members and their children. Does the district plan to give said children excused absences for the time they have been absent, to allow them make-up of homework, tests or assignments, and to give academic credit for the same?

If the school district determines not to accommodate said children, what are the reasons for the district's determination in this regard, and who made said decision so that we may write them concerning the same?

If there are any questions in regard to this matter, please feel free to call us collect at the above phone number.

Very sincerely yours,

Ralph K. Helge

RKH:vb
enclosures
vb61215

Underwood, Wilson, Berry, Stein & Johnson, R. A. Wilson, Amarillo, Tex., for defendants-appellants.

Akin, Gump, Hauer & Feld, Edward S. Koppman, Robert E. Goodfriend, Dallas, Tex., David W. Nelson, Austin, Tex., Michael J. Madigan, Joseph T. Casey, Jr., Washington, D. C., Rader, Helge & Gerson, Ralph Helge, Pasadena, Cal., for plaintiffs-appellees.

Michael B. Kusin, Houston, Tex., for amicus curiae Nat. Jewish Com'n, etc.

Before DYER *, SAM D. JOHNSON and WILLIAMS, Circuit Judges.

PER CURIAM:

Upon consideration of the briefs, the record and the oral argument of counsel for the respective parties, we are convinced that the district court correctly decided the issues presented on this appeal and we therefor adopt the Memorandum Opinion of the lower court, reported at 511 F.Supp. 613, as the opinion of this Court.

Affirmed.

CHURCH OF GOD (WORLDWIDE TEXAS REGION), et al.,
Plaintiffs-Appellees,

v.

AMARILLO INDEPENDENT SCHOOL DISTRICT, et al.,
Defendants-Appellants.

No. 81-1203.

United States Court of Appeals,
Fifth Circuit.

March 11, 1982.

Appeal from the United States District Court for the Northern District of Texas, Mary Lou Robinson, Judge.

---

* Circuit Judge of the Eleventh Circuit sitting by designation.

CHURCH OF GOD (WORLDWIDE, TEXAS REGION) et al., Plaintiffs,

v.

AMARILLO INDEPENDENT SCHOOL DISTRICT et al., Defendants.

Civ. A. No. CA 2-80-35.

United States District Court,
N. D. Texas,
Amarillo Division.

April 9, 1981.

Members of church brought action seeking to enjoin enforcement of school district's absence policy which limited number of excused absences for religious holidays to two days each school year. Upon plaintiffs' motion for summary judgment, the District Court, Mary Lou Robinson, J., held that policy of school district, which limited number of excused absences for religious holidays to two days each school year and which provided that students be given zeros for days for which they had unexcused absences, violated free exercise of religious beliefs of plaintiffs, who were members of church which required abstinence from secular activity on seven annual holy days.

Motion granted.

1. Constitutional Law ⟹84

Free exercise clause proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation; thus, if purpose or effect of a law is to impede observance of one or all religions or is to discriminate between religions, that law is unconstitutionally invalid even though burden may be characterized as being only indirect. U.S.C.A.Const. Amends. 1, 14.

2. Constitutional Law ⟹84

Under two-part balancing test for determining whether particular governmental action unduly burdens an individual's free exercise of religion, a court must first decide whether regulation or law at issue burdens free exercise of religion and, secondly, restriction on free exercise of religion must be balanced against importance of state's interest in the regulation or law; even if state's interest appears to be of greater magnitude, regulation or law will be invalid if state's interest can be achieved by a less restrictive alternative means. U.S.C.A. Const. Amends. 1, 14.

3. Constitutional Law ⟹84

Plaintiffs' belief, which was based on a literal interpretation of a biblical injunction and which required them to refrain from secular activities on holy days and days of convocation, was "religious" for First Amendment purposes. U.S.C.A.Const. Amend. 1.

4. Constitutional Law ⟹84
Schools ⟹162

Policy of school district, which limited number of excused absences for religious holidays to two days each school year and which provided that students be given zeros for days for which they had unexcused absences, violated free exercise of religious beliefs of plaintiffs, who were members of church which required abstinence from secular activity on seven annual holy days. U.S.C.A.Const. Amends. 1, 14.

Michael J. Madigan, Joseph T. Casey, Jr., Akin, Gump, Strauss, Hauer & Feld, Washington, D. C., for plaintiffs.

R. A. Wilson, Underwood, Wilson, Berry, Stein & Johnson, Amarillo, Tex., for defendants.

MEMORANDUM OPINION

MARY LOU ROBINSON, District Judge.

Plaintiffs are the Worldwide Church of God (Church of God) and twenty-four members of the church who are students of the Amarillo Independent School District. The Plaintiffs by this action under 42 U.S.C. § 1983 and 28 U.S.C. §§ 1331(a) and 1343(3), seek to enjoin the enforcement of the Amarillo School District's absence policy which limits the number of excused absences for religious holidays to two days each school year. The Defendants are the Amarillo Independent School District (school district) and the Superintendent, Deputy Superintendent, and Board of Trustees of the school district. Both the Plaintiffs and Defendants have moved for summary judgment.

I.

The Church of God is a religious organization with congregations throughout the United States, Canada, and fifty other countries. The church traces its origin to the establishment of the New Testament Church as recorded in Chapter 2 of the Book of Acts in the New Testament. The present era of the church began in 1934, with the establishment of a congregation in Eugene, Oregon, and the broadcast of the Radio Church of God. The church has a current membership of over 68,000. The membership figures do not include children and unbaptized family members who also attend the church.

A fundamental tenet of the Church of God is that members must abstain from secular activity on seven annual holy days. These holy days are founded in the Book of Leviticus in the Old Testament and are fixed in accordance with the Hebrew calendar. Members must also attend a seven-day religious convocation on the Feast of Tabernacles. All holy days except for the seven-day convocation are observed in each local church. The seven-day convocation is observed at regional locations designated by the church. The failure to observe the annual holy days and the seven-day convocation is considered a sin and may result in the loss of membership in the church.

Members of the Church of God who are students miss from eight to ten days of school each year while observing the annual holy days and seven-day convocation. An additional two days of school are sometimes missed in travel to and from the seven-day convocation depending on its date and location. The school district did not set any specific limit on the number of excused absences for religious holidays before March 5, 1979. Instead, principals of the school district were given discretion to determine when an absence would be considered excused. In making the determination the principals were instructed by the school district to consider "to what degree was choice a factor in the absence." Under that policy the Plaintiffs were, for the most part, routinely granted excused absences. The Plaintiffs were also permitted to make up school work missed while observing the holy days and seven-day convocation and to receive a grade for that work.

On March 5, 1979, the school district promulgated a new policy for excused absences and make-up work. The new policy provided:

> *Make-Up Work Following Absences*
>
> School work missed may be made up whether an absence is excused or unexcused; however, students readmitted with an unexcused absence will not be given credit for work made up. If a daily or test grade is recorded for the day of absence, the student whose absence is

> unexcused receives a zero for a grade. If no grade is recorded for the other students no grade will be recorded for the student who is absent. To obtain credit for work missed when the absence is excused, the student must make up the work. Make-up work should be accomplished within five school days after a student returns from an absence. Exceptions would be made in cases where a student has been absent for an extended period of time due to illness.
>
> *Absences for Religious Holidays*
>
> Excused absences shall be granted to students for a maximum of 2 days for religious holidays in each school year.

The new policy has been strictly enforced since its promulgation. During the 1980–1981 school year the Plaintiffs received only two excused absences for school days missed while observing their holy days and seven-day convocation. The Plaintiffs received zeros for tests and daily work missed on the remaining days of absence.

II.

The Plaintiffs contend that the school district's excused absence policy is unconstitutional because: (1) it violates the free exercise of their religion as guaranteed by the first and fourteenth amendments to the United States Constitution; (2) it violates the equal protection clause of the fourteenth amendment to the United States Constitution by discriminating against the Plaintiffs on the basis of their religious beliefs, and; (3) it violates the due process clause of the fourteenth amendment to the United States Constitution by creating an irrebuttable presumption that the Plaintiffs are absent without justification.

The Defendants contend that each of these allegations are without merit. They claim that any indirect burden that is imposed on the Plaintiffs' religious beliefs is outweighed by the school district's interest in compelling regular attendance of public school. They further claim that the school district's policy is applied to all religions uniformly, and that if the school district made an exception for the Plaintiff they would be giving recognition to the holy days of the Church of God in violation of the establishment clause of the first amendment.

III.

[1] The first amendment to the Constitution provides that "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof . . ." In *Cantwell v. Connecticut,* 310 U.S. 296, 60 S.Ct. 900, 84 L.Ed. 1213 (1940), the free exercise clause was held applicable to the states through the fourteenth amendment. The Supreme Court has interpreted the free exercise clause to proscribe not only overt discrimination but also practices that are fair in form, but discriminatory in operation. *See, Wisconsin v. Yoder,* 406 U.S. 205, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972); *Sherbert v. Verner,* 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1963); *Braunfeld v. Brown,* 366 U.S. 599, 81 S.Ct. 1144, 6 L.Ed.2d 563 (1961). Thus, "[i]f the purpose or effect of a law is to impede the observance of one or all religions or is to discriminate between religions, that law is unconstitutionally invalid even though the burden may be characterized as being only indirect." *Braunfeld v. Brown, supra* 607, 81 S.Ct. at 1148.

[2] The Supreme Court decisions require a two-part balancing test for determining whether a particular governmental action unduly burdens an individual's free exercise of religion. First, a court must decide whether the regulation or law at issue burdens the free exercise of religion. Second, the restriction on the free exercise of religion must be balanced against the importance of the state's interest in the regulation or law. *See, Wisconsin v. Yoder,* 406 U.S. 205, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972); *Sherbert v. Verner,* 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1963). Even if the state's interest appears to be of greater magnitude, the regulation or law will be invalid if the state's interest can be achieved by a less restrictive alternative means.

IV.

Under this framework for constitutional analysis the Court must first determine whether the belief at issue is a religious belief as opposed to one of a personal or secular character. Although the issue of whether a belief is rooted in religion as opposed to purely secular concerns is a "most delicate question," *Wisconsin v. Yoder, supra* 215, 92 S.Ct. at 1533, it is not one without judicial guidance. In *Brown v. Dade Christian Schools,* 556 F.2d 310 (5th Cir. 1977), Judge Roney of the Fifth Circuit delineated the elements that may and may not be taken into account in determining whether a belief is religious:

> Whether a belief is "religious" and thus deserving of some protection by the First Amendment does not depend on whether the belief is true or false. Nor does it depend on whether the belief is reprehensible to the majority of society. Instead, . . . the "religious" nature of the belief depends on . . . whether the belief is based on a theory "of man's nature or his place in the Universe." . . . which is not merely a personal preference but has an institutional quality about it, and . . . which is sincere. *Id.* at 324 (citations omitted).

[3, 4] The belief at issue meets the standard set forth by Judge Roney. The Plaintiffs' religious belief is based on a literal interpretation of a biblical injunction. Article 13 of the *Fundamentals of Belief* of the church makes the observance of the holy days and seven-day convocation an absolute duty. Indeed, if not to underscore the sincerity of the Plaintiffs' religious belief, no Plaintiff has attended school on a holy day or day of convocation since the adoption of the school district's policy, notwithstanding the penalty they must suffer to do so.

The Court does not stand alone in this conclusion. The religious character of the Plaintiffs' duty to refrain from secular activities on the holy days and days of convocation has been considered and accepted by other courts. In *Edwards v. School Board of Norton, Va.,* 483 F.Supp. 620 (W.D.Va. 1980), for example, a member of the Church of God brought an action against a school board, contending that her dismissal as a teacher's aide violated Title VII of the Civil Rights Act of 1964. The school board defended the dismissal by questioning whether her religious beliefs, which included observance of the seven-day convocation, were cognizable under Title VII. The Court rejected the defense outright and held that the plaintiff's "religious interpretation that she must refrain from work for an eight day period to attend a religious Feast of Tabernacles is to be considered a bona fide religious practice," and, therefore, protected under Title VII. *Id.* at 625. *See also, Niederhuber v. Camden Cty. Vocational & Technical School District Bd. of Education,* 495 F.Supp. 273 (D.N.J.1980); *Rankin v. Comm. on Prof. Competence of Ducor Union School District,* 24 Cal.3d 167, 154 Cal.Rptr. 907, 593 P.2d 852 (1979).

The Court next considers whether the school district's policy burdens the free exercise of the Plaintiffs' religious belief. The school district's policy limits the number of excused religious holidays to two days in each school year. Although school work missed because of an unexcused absence may be made up, no credit is given for that work. Thus, a student who is absent for religious reasons receives a grade of zero for each daily grade or test grade recorded on the days of absence in excess of the school district's two-day limit.

This policy poses an unquestionable burden on the Plaintiffs' religious belief. Under this policy the Plaintiffs are put to the choice of abandoning a tenet of their religion or suffering a penalty for the classwork missed. This burden is similar to one considered and found unconstitutional by the Supreme Court in *Sherbert v. Verner,* 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1963). In *Sherbert,* the South Carolina unemployment commission denied unemployment compensation to a member of the Seventh-Day Adventist Church because she refused to work on Saturday, the Sabbath Day of her faith. After noting that the State's ruling did not involve "criminal sanction," compelling the church member to work a six-day week, the Court nevertheless ruled that the State's action created a burden on the church member's religious belief:

> Here not only is it apparent that [the church member's] declared ineligibility for benefits derives solely from the practice of her religion, but the pressure upon her to forego that practice is unmistakable. The ruling forces her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand. Governmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against [the church member] her for Saturday worship. *Id.* at 404, 83 S.Ct. at 1794.

See also, Niederhuber v. Camden Cty. Vocational Technical School District Bd. of Education, 495 F.Supp. 273 (D.N.J.1980) (burden found in a Title VII case where plaintiff church member was "compelled to forfeit his position [as a teacher] in order to follow religious convictions.")

The Defendants contend that even if the school district's policy does burden the free exercise of religion, that burden is de minimis. The Defendants advance two arguments in support of that contention. First, they argue that with the exception of the six-week evaluation period in which the seven-day convocation occurs, only two holy days fall on school days. The Defendants reason that any grade of zero recorded during that evaluation period would not significantly alter the over-all average of a student for an academic school year. Second, the Defendants argue that any burden imposed by the school district's policy is ameliorated by the provision of the policy that allows the student to make up the work missed on days of unexcused absences.

The Court disagrees with that analysis. The burden imposed on the Plaintiffs' religious belief is real and substantial. Under the policy the Plaintiffs could conceivably receive a zero for daily work and tests given in each of their classes for as many as eight days during the school year. In *Shanley v. Northeast Independent School District, Bexar Cty., Texas,* 462 F.2d 960 (5th Cir. 1972), the Fifth Circuit stated in a case involving a school disciplinary procedure:

> "... the magnitude of a penalty should be gauged by its effect upon the student and not simply meted out by formula. For example, a suspension of one hour could be quite critical to a student if that hour encompassed a final examination that provided for no make-up." *Id.* at 967 n. 4.

The loss of grades in this case not only imposes a substantial impact upon the Plaintiffs' academic record unrelated to their actual level of achievement, but also places a stigma on the students for abiding by their religious belief.

This burden is not ameliorated by the make-up work provision. The provision does not require a teacher to evaluate the work made up. It in fact directs the teacher to enter a zero for that work. Apart from the obvious effect the policy has on the student's academic average, the policy ignores the fact that the evaluation of a student's work is a critical part of the learning process. Moreover, logic tells us that the policy provides no incentive for a student to make up work missed. Only the most disciplined student would make up work knowing that a grade of zero will be entered.

V.

The Court next considers whether some compelling interest justifies the substantial infringement of the Plaintiffs' first amendment right. The Defendants suggest that two such interests exist. First they claim that regular attendance in public school is necessary for a student's academic development. Second, they contend that accommodating the holy days of various and diverse religious groups would work an unreasonable burden on the teachers.

The Court does not doubt the sincerity of the school district's interest in the academic development of its students. The state's responsibility for the education of its citizens ranks at the apex of the function of a state. Yet even this paramount responsibility must yield when the application of a law or regulation significantly burdens the free exercise of religion. Thus, in *Wisconsin v. Yoder*, 406 U.S. 205, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972), the Supreme Court held that Wisconsin could not compel members of the Amish faith to send their children to secondary schools where such attendance was at odds with fundamental tenets of their religious beliefs. The school district's interest in this cause does not approach the magnitude of the state's interest in *Wisconsin v. Yoder.* Here we are not concerned with a religious sect that insists on keeping their children away from school. We are concerned only with the effect of a handful of absences on the Plaintiffs' academic development. This interest, standing alone, does not justify the burden placed on the free exercise of religion.

Moreover, the interest does not become compelling when coupled with the administrative burden of accommodating the Plaintiffs' religious belief. Both the Superintendent and Deputy Superintendent of the school district stated that they had never received a complaint from the teachers concerning their workload under the old excused absence policy. Teachers are routinely required to evaluate the make-up work of students who are absent because of sickness and participation in interscholastic activities such as football, basketball, and band. The Court concludes that requiring the teachers to grade the make-up work of Plaintiffs will not result in an unreasonable administrative burden.

On these facts, the Court holds that the school district's excused absence policy violates the free exercise of religion as guaranteed by the first and fourteenth amendments.

VI.

Finally, in holding that the school district must accommodate the Plaintiffs' religious belief, the Court does not foster the "establishment" of the Church of God. The Court's holding reflects nothing more than the governmental obligation of neutrality in the face of religious differences, and does not represent that involvement of religious with secular institutions which is the object of the establishment clause to forestall. *See, Sherbert v. Verner*, 374 U.S. 398, 409, 83 S.Ct. 1790, 1796, 10 L.Ed.2d 965 (1962). As stated by the Supreme Court in *Zorach v. Clauson*, 343 U.S. 306, 72 S.Ct. 679, 96 L.Ed. 954 (1952), a case which upheld a New York released time program:

> When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs. To hold that it may not would be to find in the Constitution a requirement that the government show a callous indifference to religious groups. *Id.* at 312–14, 72 S.Ct. at 683–84.

VII.

The Court concludes that the school district's policy imposes a real and substantial burden on the Plaintiffs' right to the free exercise of their religion as guaranteed by the first and fourteenth amendments. The Court does not find that the interests advanced by the Defendants in support of the policy justify that burden. The Court further concludes that the school district does not foster the establishment of the Church of God by accommodating the religious belief of the Plaintiffs. Because of the Court's resolution of these issues it is not necessary to decide the Plaintiffs' equal protection and due process arguments.

Accordingly, the Plaintiffs' motion for summary judgment is granted and judgment rendered enjoining the enforcement of the Amarillo Independent School District's excused absence policy insofar as it limits the number of excused absences for religious holidays.

JUDGMENT will be entered accordingly.

UNIT THIRTEEN

SCHOOL LAW AND THE EDUCATION OF CHILDREN WITH HANDICAPS

Preface

Watson v. City of Cambridge (32 N.E. 864, Mass., 1893.)

The Court supported the school board in expelling children who persisted in disorderly behavior "either voluntary or by reason of imbecility."

Beattie v. Board of Education (172 N.W. 153, Wisc., 1919.)

A physically handicapped child who the court found constituted no threat, and was academically capable, nevertheless produced a "depressing and nauseating effect on teachers and school children" could be expelled from school.

Introduction

This unit is presented in three parts: a) major court cases prior to 1975 and impacting on the development of P.L. 94-142; b) Federal legislation relative to the provision of special education and related services to children and youth with handicaps; and c) examples of post-P.L. 94-142 court decisions. Also included is a summary of current and pending issues involved in the education of the handicapped. The following abbreviations are used in this unit:

LEA - local education agency
(local school district)
SEA - state education agency
(state department of education)
FAPE - free, appropriate public education
IEP - Individualized Education Program
EHA - Education of the Handicapped Act
LRE - least restrictive environment

I. IMPACT OF THE COURTS PRIOR TO P.L. 94-142

A. Brown v. Board of Education (347 U.S. 483, 1954)

1. A variety of legal and special education authors contend that Brown provides the foundation for the provisions of "free, appropriate, public education" for all handicapped children as mandated by P.L. 94-142. This belief is usually based on the following:

   > "In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms."

2. The first reference to Brown in a court case involving a special education student was not until 1969 in Fred G. Wolfe v. the Legislature of the State of Utah (no. 18552546 3rd Dist. Ct. Salt Lake Co., 1969). The Court used the language of Brown in a decision concerning the rights of a mentally retarded child. In that case, the Court concluded:

   > "Segregation of the plaintiff children from the public school system has a detrimental effect upon the children as well as their families...
   >
   > (Segregation) usually interpreted as denoting their inferiority, unusualness, uselessness, and incompetency..."

B. Tracking as an Issue

1. Hobson v. Hanson (269 F. Supp. 401, D.D.C., 1967) was not a case involving special education students. It did, however, have an impact on the development of special education legislation. The court abolished the tracking system employed by the District of Columbia Schools. In arriving at that decision, the court found that the tracking system used to place students in particular programs had an adverse effect on the educational opportunities of minority students.

C. Right to Benefit and Procedural Due Process

1. PARC v. Commonwealth of Pennsylvania (343 F. Supp. 279, E.D. Pa., 1972) was a critical case in the design of P.L. 94-142. The case was a class action suit filed on behalf of mentally retarded students that resulted in a Consent Agreement accepted by a three judge panel in Federal District Court. The ruling permanently prevented the state from denying "free, public education" to any of the state's mentally retarded children.

2. The case is considered a "landmark" decision because "expert testimony" presented during the trial established that every retarded child is able to benefit from education.

3. The Consent Agreement also set forth specific provisions of how services were to be delivered and outlined procedural due process that was to be followed, including:

   a. parents' right to prior notice;

   b. right to a hearing;

   c. right to counsel;

   d. right to present evidence and witnesses; and

   e. right to cross-examine.

   (All of these steps would later be incorporated into the due process requirements of P.L. 94-142.)

D. Right of Access and Funding

1. Mills v. Board of Education (348 F. Supp. 866, D. D.C., 1972) found that the District of Columbia schools had failed to provide an education to all types of handicapping conditions. Further, the court required the establishment of a system of procedural safeguards for suspension or expulsion of children with handicaps and for placement of children in special education programs. The Court ruled:

   > "If sufficient funds are not available to finance all of the services and programs that are needed in the system then the

> available funds must be expended equitably in such a manner that no child is entirely excluded from a publicly supported education consistent with his needs and abilities to benefit therefrom."

E. Non-Discriminatory Testing

1. In Larry P. v. Riles (495 F. Supp. 926 N.D. Cal., 1979) testing and assessment procedures were questioned. The case specifically questioned the use of I.Q. tests as the sole basis for placement in special education programs. The San Francisco Board of Education had a total of 9% black students, but 27% of the special education were made-up of black children. The suit was filed as a class action. The court ruled that such a situation, in essence, resulted in a "life sentence of illiteracy" for many of those children. The children in question were not necessarily mentally retarded, but were found to be so through discriminatory testing procedures. (Note: the issues of the tests themselves was not necessarily in question, although many have raised that as an issue. The primary concerns were the testing procedures and the use of a single instrument for making placement decisions.)

2. Testing became a civil rights issue. Jane Mercer provided expert testimony in several cases including Ruiz v. State Board of Education (C.A. No. 218294, Super. Ct. Sacramento, Cal., 1972). She stated:

> "We believe that psychological assessment procedures have become a civil rights issue because the present assessment and evaluation practices violate at least five rights of children: a) their right to be evaluated within a culturally appropriate, normative framework; b) their right to be addressed as multi-dimensional, many faceted human beings; c) their right to be fully evaluated; d) their right to be free of stigmatizing labels; and e) their right to cultural identity and respect."

F. Special Education in the Commonwealth

1. In 1974, Kentucky entered into a Consent Agreement that was the result of Kentucky Association for Retarded Children, etal v. Kentucky State Board of Education. The state is still obligated by the

agreement. A copy of the Consent Agreement is provided in the Appendix to this Section.

G. Summary

Kirp (1974) summarized the actions on behalf of individuals with handicaps in the 1960's and early 70's by identifying the Constitutional standards upon which cases dealing with exclusion from school, tracking, and special education placement could be argued:

"1. The educational harm attributed to either exclusion or assignment to slow ability groups, or special programs that are not only inferior, but carry psychic injury in addition to deprivation.

2. The disproportionate assignment of minority group children that creates racially or ethnically based isolation.

3. The school's procedures for determining how a particular student or class of students should be treated, irrespective of the legitimacy of the classifications themselves." (Harvard Education Review, 44(1974), pp. 7-52)

II. FEDERAL LEGISLATION

A. P.L. 89-10, Elementary and Secondary Education Act, 1965

1. Title I of the Act provided Assistance to local school districts to create programs and services for children who were economically disadvantaged. Shortly after the passage of the program a Congressional debate centered on whether it was the intent of Congress to include the handicapped in the disadvantaged population.

B. P.L. 89-313, 1965

1. Title I of this Act provided for the support of state operated programs (typically institutions) serving children and youth with handicaps. This funding is still available, despite the federal initiative to limit and eventually eliminate segregated facilities.

C. P.L. 91-230, 1970

1. The Act attempted to consolidate a variety of federal programs for handicapped children into a simple entitlement program. (Simple entitlement programs are not a "strong suit" of the Congress.) Title VI, Part B of the Statute (which would eventually become P.L. 94-142) was directed toward assistance to states. Part B required states to submit a plan for the delivery of services and programs to children with handicaps under their jurisdiction.

D. P.L. 93-380 (Education Amendments of 1974)

1. P.L. 93-380 was a major advance in the Federal government's involvement in programs for the handicapped. It amended Part B and was titled "The Education of the Handicapped Act" (EHA). P.L. 93-380 contained several significant provisions including:

   a. The requirements that states assure "full educational opportunities" for all children with handicaps.

   b. The establishment of procedural safeguards in the areas of identification, evaluation, and placement. It greatly increased the rights of parents.

   c. The flow of dollars to the states based upon a census of the school aged population.

E. P.L. 94-142, The Education for All Handicapped Children Act, 1975.

1. P.L. 94-142 amended and extended the provisions of EHA. It also greatly increased the responsibilities of states (SEAs) in assuring the provision of "free, appropriate, public education for all handicapped students."

2. The Act was based on Congressional beliefs (acquired through extensive testimony) that there were 8 million handicapped children in the country requiring special education and related services. It was further determined that more than 50% of these children were not receiving the full complement of services necessary and one million children were excluded from public school altogether.

3. Purposes of the Act:

   a. To assure that all handicapped children have available a free, appropriate, public education which emphasizes special education and related services and is designed to meet their unique needs;

   b. To assure that the rights of children and their parents are protected;

   c. To assist states in providing such services; and

   d. To monitor and evaluate the effectiveness of the programs.

4. Dollar Changes

   a. The Act changed the dollar allocation by establishing a formula for distribution based on actual children served, not the census count provided by P.L. 93-380.

5. State Assurances

   SEAs have the primary responsibility for monitoring the compliance of local school districts (LEAs) in all areas required by P.L. 94-142. NOTE: Contrary to popular belief, the Act is a formula grant statute; states do not have to participate and do not have to assume the requirements. (Originally New Mexico did not choose to participate, currently all states participate in the program.)

   Requirements include the state assurances of identifying, locating, and evaluating all children 3-18 in need of special education services and providing appropriate programs for all children covered under the states mandatory education laws. (This requirement changed with the passage of P.L. 99-457 which is discussed in the next section.)

6. The IEP

   a. Congress was vague in the definition of "free, appropriate, public education" (FAPE). It was the intent for the Individualized Education Program (IEP) to be the mechanism for defining FAPE. Congress was specific in prescribing the contents and procedures associated with the IEP. These requirements include:

(1) The IEP is a written document to be developed in a meeting which includes a representative of the LEA (regulatory language states "a representative of the superintendent"), the child's teacher(s), the parents, and, when appropriate, the child. Regulations have expanded this group to include "someone knowledgeable of the assessment results."

(2) The contents of the plan are to include:

  (a) child's present level of educational performance;

  (b) annual goals and short term objectives;

  (c) specific educational services to be provided;

  (d) extent to which the child will participate in the regular classroom;

  (e) projected date for initiation and duration of services;

  (f) objective criteria and evaluation procedures; and

  (g) a schedule for determining whether instructional objectives are being met.

(3) The IEP must be reviewed and rewritten at least annually.

b. Obligation of the LEA in meeting the Goals and Objectives of the IEP

The LEA is responsible for providing all the services, instruction, and related services called for and agreed upon in the IEP meeting. The LEA is not held accountable for failing to meet the goals and objectives which are established for the child.

c. Evaluation Procedures

(1) Determination of a handicapping condition cannot be made on the basis of a single instrument or type of instruments (e.g., an I.Q. test).

(2) Parents must give their consent prior to an individual assessment being given. If they do not, the school district may request a hearing to request that assessment be provided.

(3) Non-discriminatory testing requires that the test be given in the native language or mode of communication.

(4) Tests must be validated and measure what they report to measure.

(5) Tests must be administered by qualified examiners.

(6) Reassessment is required every three years.

d. Related Services

(1) Related services are defined as services that are necessary in order for a child to benefit from special education.

(2) In order to qualify for related services a child must first be determined to have a handicapping condition requiring special education services.

(3) Medical services are not considered a related service except for diagnostic purposes. (This issue, however, has not been totally clarified. For example, a physical therapist must work under an M.D.'s prescription. See the supplement to this section for other cases.)

(4) Some services are considered both direct and related services depending upon the condition of the child. Speech therapy is the most common example.

(5) Psychotherapy is a continually debated issue, dependent upon the service provider (M.D. versus psychologist).

(6) The above issue is further complicated by the fact that psychological counseling is not articulated in the law but is commonly thought of as a related service.

e. Due Process Requirements

The SEA (and subsequently LEAs) must maintain procedures for:

(1) Parents to examine records of identification, evaluation, and placement and to obtain an independent evaluation of the child. (The question of who is to pay for an independent evaluation is a question that may well go to a hearing.)

(2) Protecting the rights of the child when the parents are unknown, including appointment of a surrogate parent.

(3) Providing written prior notice to parents regarding change or refusal to change the identification, evaluation, and educational placement of a child or the provision of free, appropriate public education.

(4) Notice given to parents in their native language.

(5) Opportunities for parents to present complaints relating to identification, evaluation or placement of child in a program or provision of a free, appropriate public education.

(6) Whenever a complaint has been received, parents shall have the opportunity for an impartial due process hearing conducted by the SEA or by the LEA. In the hearing the parents have the right to:

(a) full disclosure of evidence to be presented;

(b) call and cross-examine witnesses

(c) have legal counsel;

(d) determine if the hearing will be opened or closed and if the child is to be present;

(e) have copies of all records of the hearing; and

(f) appeal the decision to the SEA.

During a hearing, the child will remain in his/her current educational placement until a decision is reached.

f. Use of P.L. 94-142 Dollars

Federal dollars are designed to supplement not supplant state or local funding.
NOTE: P.L. 94-142 HAS NO EXPIRATION DATE

F. P.L. 99-457, The Education of the Handicapped Amendments, 1986

This Act makes significant modifications and extensions of EHA. Currently, there are no administrative regulations, although states have begun to implement the programs. The content of this section is based entirely on statute.)

1. The major provisions of the Amendments are those relating to children below the age of five. P.L. 94-142 had provided incentives for states to serve preschool children without requiring that they do so. (Approximately 1/2 the states mandate some sort of program for young children. Kentucky is not included in that group.)

2. Part B of P.L. 94-142 is amended to abolish the preschool incentive program and allow states to receive dollars in the development of programs leading toward mandated services for this population. Significant dollars (up to $3,800 per child) are made available to states for serving new children from three through five years of age. States have until FY 90 to have a mandated program in place for this population. Such a program must provide FAPE for all children in this category with handicaps, and extend to them and their parents all the provisions of P.L. 94-142. After FY 90 states not meeting this requirement will lose all pre-school dollars including discretionary monies.

3. Infants and Toddlers

   The Amendments created a new subpart H of EHA. Title I of this subpart creates an infant and toddler program for states. States will receive financial support for planning and developing this program until FY 90. At that point the program must be in place to provide services to all children in the population and their families in order to continue to receive federal support. States must appoint a "lead agency to administer the program." In Kentucky, the designated agency is the Cabinet for Human Resources.

The Infant and Toddler program requires that an Individual Family Service Plan be developed for all participating recipients.

III. POST P.L. 94-142 COURT CASES

A. Board of Education v. Rowley (458 U.S. 176, 1982)

1. A number of legal and special education scholars believe this to be the definitive case in establishing the responsibility of a state to provide a free, appropriate, public education. (A number of special educators and advocates do not.)

2. The parents of an eight year old child, deaf since birth, argued the need for a sign language interpreter in the regular classroom to assure an equal educational opportunity within the least restrictive environment. The child was of normal intelligence or above and was relatively adept at lip reading.

3. The Federal District Court (483 F. Supp. 528) ruled the child was entitled to an interpreter. The ruling was upheld by the U.S. Court of Appeals, 2d Circuit (632 F. 2d 945).

4. The U.S. Supreme Court reversed the decision of the lower courts. The Supreme Court Decision, based on P.L. 94-142 stated:

> "The Act's legislative history shows that Congress sought to make public education available to handicapped children, but it did not intend to impose upon states any greater substantive education standard than necessary to make such access to education meaningful.
>
> The Act's intent was more to open the door to public education to handicapped children by means of specialized education services than to guarantee any particular substantive level of education once inside...
>
> The Act does not require a state to maximize the potential of each handicapped child commensurate with the opportunity provided to non-handicapped children."

B. Smith v. Robinson (468 U.S. 992, 1984)

1. U.S. Supreme Court held that Section 504 of the Rehabilitation Act of 1973 is inapplicable when relief is available under P.L. 94-142. The case also dealt with the issue of whether a claim can be made under the Civil Rights Act when a handicapped child has been denied a "free, appropriate, public education." The court held that Congress intended "the Act to be the exclusive avenue through which a plaintiff may assert an equal protection claim to publicly financed education."

2. More importantly in the view of many, the court further ruled that attorney's fees are not available under P.L. 94-142.

3. "Handicapped Children's Protection Act of 1986," P.L. 99-372, was a Congressional response to the Smith v. Robinson case.

    a. The Act, in essence, affirmed a Congressional intent to allow parents to recover attorney's fees in successful cases. The Act, however, does more than authorize the award of attorney's fees. A summary is provided below:

        1) Effective date: Attorney's fees are recoverable in any hearing or court action filed after July 3, 1984. They are also recoverable in hearing or court actions brought before July 4, 1984 if they were still pending on that date.

        2) A parent or guardian who prevails in either a hearing or court action may recover reasonable attorney's fees with certain limitations.

        3) P.L. 94-142 is not to be interpreted as limiting any rights or remedies available under the U.S. Constitution, Section 504 or any other civil rights statute. However, a suit filed which seeks relief under P.L. 94-142, must first have been through the due process hearing process.

C. Irving Independent School District v. Tatro (468 U.S. 883, 1984)

1. The U.S. Supreme Court ruled that "clean intermittent catherization" is a related service not subject to the "medical services" exclusion of P.L. 94-142.

2. The Court established four criteria to determine a school's obligation to provide services that relate to both health and education:

   a. the child must be handicapped and require special education;

   b. only those services necessary to allow a child to benefit from special education are required;

   c. School nursing services must be provided by a nurse or another qualified individual and not a physician; and,

   d. the child's parents were asking for services only, not for the purchase of equipment.

IV. ADDITIONAL ISSUES

A. Competency Testing/Diplomas

The right of handicapped children to a free, appropriate, public education does not include the right to graduate. The inability of a child to pass a competency test is not a denial of a right of the handicapped.

B. Individualized Education Programs

IEPs are designed to meet the specific needs of handicapped children. Courts have viewed failure to provide a program designed to meet the unique needs of a child as a failure to provide FAPE.

C. "Mainstreaming"

EHA requires that each handicapped child be educated in the "least restrictive environment" (LRE) and the Act provides procedures to assure that handicapped children are educated "to the maximum extent possible with non-handicapped children."

Courts tend to uphold "LRE" decisions where a child's educational needs can be met in the regular classroom. Courts also tend to rule in favor of public school programs rather than private/residential placements.

D. Related Services

Services such as occupational therapy, family counseling, etc. requested by parents have no clear conclusions. Decisions vary dependent on particular facts in specific cases. There is real confusion revolving around psychotherapy. Physical therapy is not as clear cut as many believe.

E. Transportation

Transportation is typically treated as a related service. Denial of transportation will probably be viewed as a denial of FAPE.

F. Services for Children Below the Age of 5 and Adults over 18

Currently totally controlled by state law and regulation. This will change as states move toward implementing P.L. 99-457.

G. Length of School Year

A majority of court cases have held that handicapped children are entitled to a summer program if the possibility of significant regression can be shown.

H. Suspension and Expulsion

Courts have generally not accepted definite, short term suspension as a change in placement. Expulsion and indefinite suspension are usually treated as a change in placement triggering due process provisions.

V. REHABILITATION ACT OF 1973 - P.L. 93-112

P.L.93-112, Title V of the Rehabilitation Act of 1973, provides that individuals with handicaps may not be discriminated against in any program receiving federal assistance. The Act is enforced by the Office for Civil Rights.

A. P.L. 93-112 has four sections:

1. Section 501 requires affirmative actions programs of all federal recipients to hire and promote qualified handicapped individuals.

2. Section 502 stipulates the removal of architectural barriers.

3. Section 503 requires all federal contractees to enforce affirmative action programs.

4. Section 504 prohibits discrimination against qualified handicapped persons in all institutions receiving financial assistance.

B. Similarities and Differences in Section 504 and EHA

1. Both address some issues relative to the education of students with handicaps. Subpart D of Section 504 details the rights and responsibilities of both elementary and secondary education programs. These are the common elements in the two laws:

    a. A free appropriate education must be provided;

    b. handicapped children must be educated with non-handicapped children to the maximum extent possible;

    c. procedures must be in place for the identification and location of all handicapped students; and

    d. procedural safeguards must be in place.

2. The two Acts differ in five aspects:

    a. P.L. 94-142 is a voluntary program. Its provisions are applicable only to those states that apply for and accept the entitlement. Section 504 is a mandatory civil rights act which applies to all recipients of federal funds. There are no funds provided to comply with Section 504.

    b. P.L. 94-142 is monitored by the Office of Special Education and Rehabilitative Services (OSERS). Section 504 is monitored and enforced by the Office for Civil Rights.

    c. Section 504 covers programs other than elementary and secondary education. It also includes post-secondary education, and other programs receiving federal monies.

    d. Section 504 also protects the rights of persons with handicaps as employees of agencies receiving federal dollars.

    e. Each Act has its own definitions of "handicapped."

SUPPLEMENT TO UNIT THIRTEEN

CASES ON EDUCATION OF HANDICAPPED CHILDREN AND YOUTH

1. The parents of a learning disabled child in Iowa questioned the appropriateness of the program provided by the local school district. They requested that the child be enrolled in a program offered by the neighboring school district, which they believed to be superior. They ask that the school district pay the tuition. The district refused. The parents took the case to court. How did the court rule?

2. A child exhibited severe maladaptive behavior. The parents contended the child was autistic. The school district contended that the child was severely retarded. Both had "experts" supporting their respective positions.

   When the child reached the age of 15 the parents and the schools could not agree upon the diagnosis and consequently could not agree on the IEP for the child. The parents filed suit in a U.S. District Court on the basis that the child was being denied a free, appropriate public education.

   How did the court rule relative to the diagnosis?

   How did the court rule relative to placement?

3. Parents of a severely mentally retarded daughter were unhappy with the child's placement in a school for severely retarded children. They requested that the home district of the child place her in one or two public school programs in that district. The district refused, claiming that the current placement best met her educational needs. The parents withdrew their child from the program and instituted a hearing. The hearing officer found that the school district could not demonstrate that the placement in the current program was in the least restrictive environment and ordered the schools to place the child in a public school program. The school district and the State Department of Education appealed the decision.

4. Parents of an emotionally disturbed 11 year old boy agreed to place their child in a special education day program for the emotionally disturbed. The school provided a program of individual child psychotherapy, family therapy with the parents, a therapeutic activity group and individual and group counseling and behavior modification. After two years

in the program, the child was admitted back into his home school. The parents were informed by the school that the cost of psychotherapy provided to the child was to be assessed to them - $25,000. The parents took the issue to court. Who pays?

5. A fourth grade student born with spinal bifida requires catherization in order to attend the neighborhood school. The School district refuses to provide the service claiming that it is not a required related service, but a medical service. Further, the school district claims that under Pennsylvania state law, school nurses are not required to perform CIC. The parents claim that the child is being denied free, appropriate public education in the least restrictive environment. What does the court say?

6. A seventeen (17) year old student in Illinois who was labeled as handicapped told his teacher, "I'm not serving your fucking detention. Fuck you." Surprising as it may seem, he was suspended for five days. His parent contested the suspension on the grounds that it was a change of placement. The local hearing officer upheld the suspension. The parents appealed to the state. The state superintendent reversed the decision, stating that the child was in an inappropriate placement that was too advanced and that it led to his emotional outburst. The school district appealed the decision to U.S. District Court. How did the Court rule?

7. A fourteen (14) year old girl who was deaf, blind and emotionally disturbed was a resident in a New York school for the blind. The child persisted in self-abusive behaviors. She was suspended. The school claimed that they did not have sufficient staff to keep the child from being a danger to herself or other residents. The school noted that she had been hospitalized on several occasions for self-inflicted wounds. The suspension was to last until "such time it appeared to be in the best interest of the child and the school to revoke the suspension." The mother brought suit against the school to require readmission. How did the court rule?

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
FRANKFORT

CIVIL NO. 435

KENTUCKY ASSOCIATION FOR RETARDED
CHILDREN, ET AL PLAINTIFFS

V.

KENTUCKY STATE BOARD OF EDUCATION,
ET AL DEFENDANTS

JUDGMENT

On November 8, 1974, the parties filed a "Consent Agreement". This consent agreement, in the opinion of the court, covers all questions involved in this litigation and sets forth a comprehensive program for implementing the provisions of the law requiring the availability in each school district in the commonwealth for the education and development of each of the exceptional children as they are so identified.

This consent agreement is therefore accepted as a part of this judgment.

November 12, 1974 /s/ Mac Swinford, Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF KENTUCKY
AT FRANKFORT

KENTUCKY ASSOCIATION FOR RETARDED CHILDREN, et al., Plaintiffs,	)	
v.	)	CONSENT AGREEMENT CIVIL ACTION NO. 435
KENTUCKY STATE BOARD OF EDUCATION, et al., Defendants.	)	

This action having been instituted by plaintiffs to establish, inter alia, the right of exceptional children in Kentucky to a free public education; and the parties hereto and their counsel having given careful study to the statutes, legal principles, and case law applicable to the issues raised:

NOW, THEREFORE, the parties hereto agree as follows:

1. The Commonwealth of Kentucky has established a comprehensive statutory system of public education for the benefit of children, including those with physical, mental, emotional, or learning handicaps, and each child eligible by statute or by regulation of the Kentucky State Board of Education for public education has the right to a similar opportunity for inclusion in that system.

2. The statutory system establishes the right of exceptional children, as defined in KRS 157.200 and who are of compulsory school age, to education and related training provided for therein suitable to their needs, capacities, and capabilities.

3. The Commonwealth of Kentucky having by said statutory system established such right, the exclusion from that education system of children with physical, mental, emotional, or learning handicaps where the sole basis for such exclusion is the fact that there is no educational program in the local school district is a denial of rights guaranteed by the constitution and law of the Commonwealth of Kentucky and the Constitution of the United States of America.

4. The absence of a special education program in a local school district suitable to the needs, capacities, and capabilities of an exceptional child or a determination that an exceptional child may not benefit from the regular program of education in that district is not, in itself and without consideration of any other factor, a ground for exclusion of such child from the public school systems of the Commonwealth.

5. Where there is probable cause to believe that an exceptional child may benefit from an established and existing educational program within a local school district, that child must be provided an opportunity to participate in such local program. Exclusion of an exceptional child from the local school district by referring such child to a regional or state wide residential facility should be undertaken only where it is neither reasonable nor practical to educate such child at the local level.

6. Inclusion in the public education system is of such fundamental importance to exceptional children as to require

that certain basic safeguards be invoked when a child is excluded from the public education system.

7. The defendant, Kentucky State Board of Education, and the defendant, Lyman V. Ginger, Superintendent of Public Instruction, agree forthwith:

a. To use all lawful and reasonable means to see that existing statutes, regulations, and this Consent Agreement are fully and equally enforced throughout the Commonwealth with due consideration being given to the independent nature, problems, and characteristics of each local school district.

b. To continue to evaluate the Five Year Plans for special education submitted by local school districts and to establish guidelines for the continued supervision, direction and guidance of all local school districts in the Commonwealth in implementing the laws and regulations of the Commonwealth, said Five Year Plans, and this Consent Agreement.

c. To exercise, where appropriate, the authority to withhold minimum foundation funds from a local school district which does not make a reasonable, good faith effort to provide for the educational needs of exceptional children in accordance with an approved Five Year Plan of that local district.

d. To establish, by regulation, procedures and guidelines pursuant to which all local school districts in the Commonwealth shall commence and/or continue identification of exceptional children residing in such districts, who are otherwise eligible for attendance in the public education system but who are not attending a program of the local district. Defendants further agree to establish, by regulation, procedures by which local school districts shall (i) notify in writing the parents of children so identified of their right to receive an educational opportunity from the public schools sufficient to their needs under the laws of the Commonwealth and the terms of this Consent Agreement and (ii) forward a copy of a report of such identification and notification to the Kentucky Department of Education.

e. To establish, by regulation, procedures by which each exceptional child, for whom there is no existing local regular or special program or who is otherwise excluded from a local school system, shall receive a hearing in regard to that child's educational opportunities under the laws of the Commonwealth and the regulations of defendant Kentucky State Board of Education. Such hearing shall be conducted on an informal basis and shall consist of notification to the parents and an opportunity for them to appear before the appropriate local school authorities with respect to such exclusion. At that hearing, information shall be furnished to the parents concerning all available programs suitable to the needs, capacities, and capabilities of the child so advised and the responsibilities of the local school district with regard thereto. A written report of such hearing along with a statement as to determinations made in regard to the further education of such a child shall be forwarded to the Kentucky Department of Education.

f. To adopt a regulation establishing an appeals procedure within the Department of Education of the Commonwealth of Kentucky for appeals by a parent of an exceptional child for whom no local regular or special program has been provided in order to co-ordinate various special education programs which may be available to the child outside the local school district. The regulation shall direct the state Superintendent of Public Instruction to designate an individual or individuals within the Department of Education of the Commonwealth of Kentucky to hear such appeals. Such procedure shall be so structured as to guarantee that said appeal may be prosecuted in a minimum amount of time.

g. To continue to direct and require that each school district comply with the regulations and guidelines promulgated by defendants relative to the education of exceptional children.

8. Attached hereto as Exhibit A is the affidavit of Lyman V. Ginger.

KENTUCKY ASSOCIATION FOR RETARDED
CHILDREN, UNITED CEREBRAL PALSY
OF KENTUCKY, KENTUCKY PARENTS OF
CHILDREN WITH COMMUNICATION DIS-
ORDERS, KENTUCKY FEDERATION COUNCIL
FOR EXCEPTIONAL CHILDREN, JEFFERSON
COUNTY ASSOCIATION FOR CHILDREN WITH
LEARNING DISABILITIES, and GREATER
LOUISVILLE COUNCIL FOR THE HEARING
IMPAIRED, all Kentucky corporations

By: Sgd. Harry Sample, Chairman, Action
Committee for Exceptional Children,
an association comprised of the
foregoing corporations

Sgd. THOMAS and MARY MURRAY, Individually
as Parents and Guardians ad Litem and as
next friends on behalf of DANIEL R. MURRAY

Sgd. ROBERT and DEANNA GRAY, Individually
as Parents and Guardians ad Litem and as
next friends on behalf of JONATHAN GRAY

Sgd. GAYLE and CHARLOTTE REES, Individually
as Parents and Guardians ad Litem and as
next friends on behalf of JENNIFER REES

Sgd. ROBERT and MARY BEHRENS, Individually
as Parents and Guardians ad Litem and as
next friends on behalf of DONNA BEHRENS

Sgd. GILBERT and WILMA LITTRELL, Individually
as Parents and Guardians ad Litem and as
next friends on behalf of DAVID LITTRELL

Sgd. GLEN and DOROTHY STASSEN, Individually
as Parents and Guardians ad Litem and as
next friends on behalf of DAVID STASSEN

Sgd. STEVEN and LUCY KINSER, Individually
as Parents and Guardians ad Litem and as
next friends on behalf of RUSSELL PIPPIN

Sgd. David G. Vest
Counsel for Plaintiffs

KENTUCKY STATE BOARD OF EDUCATION and
LYMAN V. GINGER, Superintendent of
Public Instruction of Kentucky

By: Sgd. Lyman V. Ginger, As Superintendent
of Public Instruction and Executive
Officer of the Kentucky State Board
of Education

Sgd. Bert T. Combs
Counsel for Defendants, Kentucky State
Board of Education and Lyman V. Ginger,
Superintendent of Public Instruction

Appendix A

Selected Provisions of the U.S. Constitution

ARTICLE I

• • •

Section 8. [1] The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; . . .

ARTICLE III

Section 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services a Compensation, which shall not be diminished during their Continuance in Office. . . .

Section 2. [1] The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States and Treaties made, or which shall be made, under their Authority; . . . to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under the Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects. . . .

ARTICLE VI

[2] This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

• • •

AMENDMENT I [1791]

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

• • •

AMENDMENT IV [1791]

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

AMENDMENT V [1791]

No person shall be . . . compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

• • •

AMENDMENT VIII [1791]

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

AMENDMENT IX [1791]

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

AMENDMENT X [1791]

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

• • •

AMENDMENT XIV [1868]

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

• • •

AMENDMENT XXVII [Proposed]

Section 1. Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex.

Section 2. The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.

Section 3. This amendment shall take effect two years after the date of ratification.

Appendix B

Glossary

Appeal: a petition to a higher court to alter the decision of a lower court.

Appellate court: a tribunal having jurisdiction to review decisions on appeal from inferior courts.

Assault: the placing of another in fear of bodily harm.

Battery: the unlawful touching of another with intent to harm.

Certiorari: a writ of review whereby an action is removed from an inferior court to an appellate court for additional proceedings.

Civil action: a judicial proceeding to redress an infringement of individual civil rights, in contrast to a criminal action brought by the state to redress public wrongs.

Civil right: a personal right that accompanies citizenship.

Class action suit: a judicial proceeding brought on behalf of a number of persons similarly situated.

Common law: a body of rules and principles derived from usage or from judicial decisions enforcing such usage.

Concurring opinion: a statement by a judge or judges, separate from the majority opinion, that endorses the result of the decision but expresses some disagreement with the reasoning of the majority.

Consent decree: an agreement, sanctioned by a court, that is binding on the consenting parties.

Consideration: something of value given or promised for the purpose of forming a contract.

Contract: an agreement between two or more competent parties that creates, alters, or dissolves a legal relationship.

Criminal action: a judicial proceeding brought by the state against a person charged with a public offense.

Damages: an award made to an individual because of a legal wrong.

Declaratory relief: a judicial declaration of the rights of the plaintiff without an assessment of damages against the defendant.

De facto segregation: separation of the races that exists but does not result from action of the state or its agents.

Defamation: false and intentional communication that injures a person's character or reputation.

Defendant: the party against whom a court action is brought.

De jure segregation: separation of the races by law or by action of the state or its agents.

De minimis: something that is insignificant, not worthy of judicial review.

Dictum: a statement made by a judge in delivering an opinion that does not relate directly to the issue being decided and does not embody the sentiment of the court.

Discretionary power: authority that involves the exercise of judgment.

Dissenting opinion: a statement by a judge or judges who disagree with the decision of the majority of the justices in a case.

Due process: the fundamental right to notice of charges and an opportunity to rebut the charges before a fair tribunal if life, liberty, or property rights are at stake.

Governmental function: an activity performed in discharging official duties of a state or municipal agency.

Governmental immunity: the common law doctrine that governmental agencies cannot be held liable for the negligent acts of their officers, agents, or employees.

Injunction: a writ issued by a court prohibiting a defendant from acting in a prescribed manner.

In loco parentis: in place of parent; charged with rights and duties of a parent.

Liability: an obligation one is bound by law to discharge.

Mediation: the process by which a neutral third party serving as an intermediary attempts to persuade disagreeing parties to settle their dispute.

Ministerial duty: an act that does not involve discretion and must be carried out in a manner specified by legal authority.

Negligence: the failure to exercise the degree of care that a reasonably prudent person would exercise under similar conditions.

Plaintiff: the party initiating a judicial action.

Plenary power: full, complete, absolute power.

Precedent: a judicial decision serving as authority for subsequent cases involving similar questions of law.

Prima facie: a fact presumed to be true unless disproven by contrary evidence.

Probable cause: reasonable grounds, supported by sufficient evidence, to warrant a cautious person to believe that the individual is guilty of the offense charged.

Proprietary function: an activity (often for profit) performed by a state or municipal agency that could as easily be performed by a private corporation.

Remand: to send a case back to the original court for additional proceedings.

Stare decisis: to abide by decided cases; to adhere to precedent.

Statute: an act by the legislative branch of government expressing its will and constituting the law of the state.

Tenure: a statutory right that confers permanent employment on teachers, protecting them from dismissal except for adequate cause.

Tort: a civil wrong, independent of contract, for which a remedy in damages is sought.

Ultra vires: beyond the scope of authority of the corporate body.

Vacate: to set aside; to render a judgment void.

Verdict: a decision of a jury on questions submitted for trial.